Petition

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IN THE

Supreme Court of the United States

October Term, 1981

THEATRES WEST, INC., dba WESTWORLD CINEMA, THEATRE DEAUVILLE and CINEMA WEST, *et al.*,

Petitioners,

vs.

JOHN HOLMES, HARRIS COUNTY DISTRICT ATTORNEY, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, Unit A.

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Questions Presented.

1. Did the court of appeals err in abstaining under the *Pullman* rationale from deciding a 42 U.S.C. §1983 first amendment overbreadth challenge to a recently enacted state criminal obscenity statute, where:

(a) the court of appeals acknowledged that petitioners' overbreadth challenges to two of the statute's key definitional provisions are "significant" and the provisions, as written are capable of suppressing protected speech; and

(b) the court of appeals justified abstention solely to give the state courts a "first look" at the statute in the hope that they might render an authoritative narrowing construction; and

(c) precisely the same state court "first look" abstention doctrine was rejected by this Court in *Vance v. Universal Amusement Company, Inc.*, 445 U.S. 308 (1980), and *Spokane Arcades, Inc. v. Brockett*, ____ U.S. ____, 50 U.S.L.W. 3373 (November 9, 1981).

2. Did the court of appeals misapply the *Younger* doctrine of comity to justify "abstention", where:

(a) no criminal prosecutions were brought pursuant to the state statute until *after* the district court refused to abstain and rendered a final judgment on the merits; and

(b) the *sua sponte* decision of the court of appeals to abstain occurred after the federal litigation had been pending for two years.

3. Did the court of appeals err in rejecting petitioners' facial constitutional challenge to the "Obscene Devices" section of the state criminal statute by relying solely upon this Court's dismissal, for want of a substantial federal question, of an appeal from a conviction under another state's similar statute, where:

(a) the criminal defendant in the prior action had standing only to challenge the statute's vagueness as

applied to his particular conduct, whereas petitioners affirmatively challenged the vagueness of such a statute as applied to a far greater number of circumstances; and

(b) the court of appeals apparently construed this Court's previous dismissal to preclude petitioners' challenge on privacy grounds even though this Court has held that summary dismissals should not be interpreted as breaking new ground and no opinion of this Court has ever addressed whether a right of privacy exists under comparable circumstances; and

(c) the court of appeals which considered itself bound by this Court's dismissal for want of a substantial federal question was not provided by the parties with the jurisdictional statement or briefs filed in this Court, and the court of appeals made no reference to the jurisdictional statement or briefs?

List of Parties.

The following is a list of all parties of record in the court of appeals in addition to those appearing in the caption of the present petition:

Red Bluff Drive-In, Inc. d/b/a Red Bluff Drive-In; Triple H Corp., d/b/a Lone Star Drive-In; Texas National Theatre Inc., d/b/a/ Fiesta Drive-In, Rebel Drive-In, Riverside Drive-In; M G J Corp., d/b/a/ Josephine Theatre; Scorpio Communication Inc., d/b/a French Quatre Club; Bromar Investment, Inc., d/b/a/ Fine Arts Theatre; Academy Theatres, Inc., d/b/a/ Academy Theatre, West Branch Cinema; Universal Video; Finne Arts Theatre; Continental Theatre; Montrose Venture, Inc., d/b/a Studz News, Asylum Bookstore, Ballpark Bookstore, This Week in Texas; Big D Newsstand; Golden Antiques, Inc., d/b/a/ Golden Antiques; Mini Drive-In; Henry Gullick; Carl Thomas; Rene Guerra; H. F. Hopkins; 909 Congress Corp., d/b/a Adult Book Shoppe; 1408 Texas Corp., d/b/a Charlies Adult Book

Store; 7637½ Long Point Corp., d/b/a Pleasure Palace; 2772 Ella Corp. d/b/a Adult Book Shoppe; 12716 Market Corp., d/b/a Adult Book Shoppe; 5200 Telephone Corp., d/b/a Mr. Peppers Book Store; 4330 Richmond Corp., d/b/a Mr. Peppers Book Store; 506 Airline Corp., d/b/a Mr. Peepers Book Store; 7106 N. Shepherd Corp., d/b/a Paris Adult Book Store; Dennis Bara,d/b/a Palace Book Store; Sekant, Inc., and Jolar Cinema, Crystal Theater, Inc.; Show World of Dallas, Inc.; Ellwest Stereo Theater of Fort Worth, Inc.; Charles Carlack, d/b/a Paris Book Store I, Park's Book Store II; Larry Carlack, d/b/a Denmark Book Store; Tidemark, Inc.,

Carol Vance, Harris County District Attorney; John Holmes, District Attorney of Harris County; H. D. Caldwell, Chief of Police for the City of Houston; Jack Heard, Sheriff of Harris County, Texas; Henry Wade, Dallas County District Attorney; Glen D. King, Chief of Police for the City of Dallas; Lee Struble, Sheriff of Dallas County, Texas; Don L. Jackson, Chief of Police for the City of Pharr; Brig Marmolejo, Sheriff of Hidalgo County, Texas; Ronald Earle, Travis County District Attorney; Frank Dyson, Chief of Police for the City of Austin; Raymond Frank, Sheriff of Travis County, Texas; James F. Hury, Jr., Galveston County District Attorney; Ernest Galvan, Chief of Police for the City of Galveston; J. B. Kline, Sheriff of Galveston County, Texas; Tim Curry, Tarrant County District Attorney; A. J. Brown, Chief of Police for the City of Fort Worth; Lon Evans, Sheriff of Tarrant County, Texas; Bill White, Bexar County District Attorney; Emil E. Peters, Chief of Police for the City of San Antonio; Rudolph C. Garza, Sheriff of Bexar County, Texas; Mark White, Attorney General of the State of Texas; City of Houston, a Municipal Corporation.

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No. ....

IN THE

Supreme Court of the United States

October Term, 1981

THEATRES WEST, INC., dba WESTWORLD CINEMA, THEATRE DEAUVILLE and CINEMA WEST, *et al.*,

Petitioners,

vs.

JOHN HOLMES, HARRIS COUNTY DISTRICT ATTORNEY, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, Unit A.

Petitioners, THEATRES WEST, INC., dba WESTWORLD CINEMA, THEATRE DEAUVILLE AND CINEMA WEST, ET AL.[1] pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, Unit A, entered in the above-entitled case on June 23, 1981.

[1]FIVE STAR FILMS; UNIVERSAL AMUSEMENT COMPANY, dba BROADWAY THEATRE, ART CINEMA ADULT THEATRE AND VILLAGE THEATRE; STARBASE PUBLISHING COMPANY, INC.; FIRST RESPONSIVE FINANCIAL GROUP, INC., ADONIS ADULT NEWS CORP., dba MAINSTREET NEWS; GESSNER NEWS, ADONIS I, ADONIS II, ADONIS III AND MARK IV; AND LONESTAR NEWS AND T SHIRTS, INC., dba LONESTAR NEWS.

Opinions Below.

The opinion of the United States Court of Appeals for the Fifth Circuit, Unit A, *sub nom., Red Bluff Drive-In, Inc. v. Vance,* is reported in 648 F.2d 1020, and a copy of the opinion appears in Appendix "A" hereto. The opinion rendered by the District Court for the Southern District of Texas in the consolidated cases in which petitioners were parties was unpublished, and a copy thereof appears in Appendix "B" hereto.[2]

Jurisdiction.

The judgment of the Court of Appeals for the Fifth Circuit, Unit A, was rendered on June 23, 1981, and a copy thereof appears in Appendix "C" hereto.

Due and timely separate petitions for rehearing and *en banc* consideration, after decision and opinion by the said court of appeals, were denied on August 23, 1981. A copy of the order denying the petitions for rehearing and *en banc* consideration by the United States Court of Appeals for the Fifth Circuit, Unit A, appears in Appendix "D" hereto.

This Court's jurisdiction is invoked under Title 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First and Fourteenth Amendments to the Constitution of the United States, Title 28 U.S.C. § 1651, Rule 8, Federal Rules of Appellate Pro-

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[2]Three similar but separate lawsuits were filed and consolidated for trial in the Southern District of Texas; contemporaneously, two separate, unrelated but similar lawsuits were filed and consolidated for trial in the Northern District of Texas. Petitioners were parties only in the three lawsuits which were filed and consolidated in the Southern District of Texas. All five cases were consolidated on appeal to the United States Court of Appeals for the Fifth Circuit, Unit A. One opinion was rendered by the court of appeals in conjunction with its disposition of the five consolidated appeals.

cedure, Title 42 U.S.C. §§ 1983 and 1988, and Title IX, subchapter B of the Texas Penal Code as amended (§§ 43.21 and 43.23) appear in Appendix "E" hereto.

Statement of the Case.

In late 1979, the Texas Legislature adopted a new anti-obscenity law which was to become effective on September 1, 1979. Petitioners and scores of others challenged the new legislation in August of 1979—prior to its effective date—by filing appropriate actions for declaratory and injunctive relief pursuant to the Federal Civil Rights Act, 42 U.S.C. § 1983 [*see* fn. 2, *supra*]. Plaintiffs sought declarations that the challenged legislation was unconstitutional and injunctions barring the named defendants—all Texas municipal, county or state law enforcement officials—from enforcing the subject legislation against them. Attorneys' fees were also sought pursuant to 42 U.S.C. § 1988.

After initially granting interim relief, the district courts refused to abstain, concluded that plaintiffs' claims were unfounded, that the legislation was not unconstitutional and that injunctive relief was not appropriate, and based thereupon, vacated the previously issued interim relief, denied permanent injunctive relief and dismissed the complaints on September 10, 1979. Notices of appeal to the United States Court of Appeals for the Fifth Circuit were timely filed by most of the plaintiffs below and the matters consolidated on appeal by the court. No cross-appeals were taken by any defendants below. Applications for emergency stays of the order of the District Court for the Southern District of Texas vacating its previously issued preliminary injunction were made by petitioners and others and were granted on September 12, 1979. The applications for a permanent stay pending appeal were ultimately denied and the emergency stay vacated on October 12, 1979. The decision of the United States Court of Appeals for the Fifth Circuit (Unit A) was rendered on June 23, 1981. Petitions for re-

hearing and *en banc* consideration were denied on August 23, 1981.

The court of appeals affirmed all aspects of the decisions below except the district courts' upholding of the constitutionality of four sections of the challenged legislation: §§ 43.21(a)(4) and (5) and 43.23(e) and (f), which portions of the decisions were vacated pursuant to the court's decision to abstain in light of unnamed pending ". . . ongoing state criminal proceedings in which the issue may be resolved and the potential for narrowing state court construction" (648 F.2d 1020, 1029 (1981).)

The court concluded that because no state criminal prosecutions were then pending, the district courts had properly refused to invoke *Younger* abstention. The court additionally noted that ". . . in view of the high cost of abstention in the context of . . . a purported chilling effect on First Amendment rights, *see Procunier v. Martinez*, 416 U.S. 396, 404 (1974)" (648 F.2d at 1032), the courts below in not abstaining had not abused their discretion. Nonetheless, the court abstained focusing on asserted intervening circumstances between trial and appeal, *e.g.*, the pendency of unspecified criminal prosecutions throughout the state, all of which were initiated significantly *after* the entry of the *judgments* below.

Although noting that "*Pullman*-influenced abstention dictates a remand of the case to the continuing jurisdiction of the district court," (fn. 4, 648 F.2d at 1025) the court "vacated the judgments below as to the said portions and dismissed the claims . . . without prejudice" (*Id.*) because of a perceived peculiarity of Texas law

> ". . . in order to remove any obstacles to an adjudication of the plaintiffs' rights in state courts and to assure the availability of a federal forum should the state adjudication prove unsatisfactory, we dismiss these claims without prejudice." (fn. 4, *Id.*)

In so doing, the court not only failed to give petitioners any interim relief pending completion of state judicial proceedings, but, it also precluded the possibility of petitioners' obtaining such relief from the district courts.

Petitioners below challenged as unconstitutionally vague and overbroad § 43.21(a)(7) of the Texas Penal Code which subsection defines devices—including dildos and artificial vaginas—"designed or marketed as useful primarily for the stimulation of human genital organs" as obscene *per se*. Concluding that

> "[T]he language is patterned on the Georgia obscenity statute . . . [a constitutional challenge to which was contained in an appeal] dismissed by this Court for want of a substantial federal question in *Sewell v. Georgia*, 435 U.S. 982 (1978),"

the court in reliance on this Court's ruling, affirmed the conclusions of the courts below that the Texas "device" statutory subsection was constitutional. *Id.* at 1028.

After affirming most of the trial courts' rulings and dismissing petitioners' claims following its decision to abstain, the court taxed costs on appeal against petitioners. It is to review the court's affirmance in reliance on *Sewell, supra*, abstention, dismissal and refusal to grant interim relief that this petition for a writ of certiorari is respectfully submitted.

REASONS FOR GRANTING THE WRIT.

I.

THE DECISION OF THE COURT OF APPEALS TO ABSTAIN SUA SPONTE IN A CASE INVOLVING A FACIAL CHALLENGE ON FIRST AMENDMENT OVERBREADTH GROUNDS TO A CRIMINAL STATUTE WHICH NECESSARILY REGULATES EXPRESSION PRESUMPTIVELY PROTECTED BY THE FIRST AMENDMENT DEPRIVES PETITIONERS OF THEIR CONSTITUTIONALLY MANDATED RIGHT TO VINDICATE THEIR CONSTITUTIONAL CLAIMS IN THE COURTS OF THE UNITED STATES AND IS IN DIRECT AND SPECIFIC CONFLICT WITH DECISIONS OF THIS COURT.

A. The Challenged Legislation Is Facially Overbroad.

Petitioners sought declaratory and injunctive relief from enforcement of § 43.21 *et seq.*, V.A.P.C., *inter alia*, on the ground that several sections of the challenged legislation were facially unconstitutionally *overbroad* in several critical respects. The challenges were directed to those portions of the Texas anti-obscenity legislation which deviated sufficiently from the constitutional requirements for anti-obscenity legislation articulated by this Court in *Miller v. California*, 413 U.S. 15 (1973), so as to render the Texas law unconstitutionally *overbroad* on its face.

The new challenged legislation differed from preexisting Texas law and arguably from this Court's standards in two significant ways. Both of these were challenged by petitioners, and both of these constituted bases for the court's decision to abstain. In § 43.21(a)(4), "patently offensive" was defined as "so offensive on its face as to affront current community standards of decency." Both under the *Miller* formulation and under the challenged Texas legislation, representations or descriptions of specified sexual acts must be "patently offensive" in order to satisfy that element of the constitutionally required tripartite test for determining obscenity. Petitioners argued below that this Court in several

decisions, most recently in *Smith v. United States*, 431 U.S. 291 (1977), proclaimed that "community standards must be applied by juries in accordance with their own understanding of the *tolerance* of the average person in their community . . . ." (431 U.S. at 305), and that the challenged statutory reference to "current community standards of *decency*" had been rejected by this Court.

Petitioners also attacked several legislatively created presumptions. Section 43.23(e) provides that "a person who promotes . . . obscene material . . . in the course of his business is presumed to do so with knowledge of its content and character." Section 43.23(f) provides that "a person who possesses six or more obscene devices of identical or similar obscene articles is presumed to possess them with intent to promote the same." Petitioners asserted that the effect of the challenged presumptions was to eliminate the constitutionally required necessity of proving scienter in any obscenity prosecutions and that obscenity statutes permitting criminal convictions without proof of scienter offend settled First Amendment principles. *Smith v. California*, 361 U.S. 147 (1959).

Petitioners further argued, as set forth in the court's opinion that:

> "[B]y allowing a jury to infer guilty intent from possession and guilty knowledge from possession coupled with guilty intent . . . the statute stacks one presumption atop another to eliminate an effective scienter element of the crime. Put another way it is urged that with these presumptions in operation, the State may satisfy its burden of proving that a person intended to sell items he knew to be obscene by showing mere possession of the outlawed materials." 648 F.2d at 1031.

Petitioners argued below and reiterate herein that the aforesaid challenged sections affect critical, non-peripheral aspects of the constitutionally required elements of obscen-

ity legislation, are fatally overbroad on their face, have resulted and will result in the prosecution and suppression of expression which is constitutionally insulated from state interference and exert a chilling effect on freedom of expression by their very existence throughout Texas and on petitioners in particular.

The court of appeals noted that said challenges were based on *overbreadth* and agreed that petitioners had raised "significant" questions with respect to the aforesaid issues.

1. The court noted that

> ". . . the line between protected expression and punishable obscenity must be drawn at the limits of a community's *tolerance* rather than in accordance with the dangerous standards of propriety and taste." 648 F.2d at 1029. (Emphasis added.)

and further observed that

> "[W]hether Texas has exceeded its constitutional authority to regulate obscenity by defining 'patently offensive' in terms of 'decency' rather than 'tolerance' is a significant question." *Id.* at 1029.

In its opening brief on appeal, STARBASE PUBLISHING CO., one of the petitioners, pointed out that there was a significant semantical difference between "decency" and "tolerance," stating that

> " 'decency' is defined, *inter alia*, as 'literary decorum or the quality or state of being decent; conformity to standards of taste, propriety or quality.' Webster's New Collegiate Dictionary 293 (1976). 'Decent' is defined, *inter alia*, as 'conforming to standards of propriety, good taste, or morality.' *Ibid.* 'Tolerance,' on the other hand, is defined, *inter alia*, as 'sympathy or indulgence for beliefs or practices differing from or conflicting with one's own. The acts of allowing something or the allowable deviation from a standard.' (Emphasis added.)

Ibid. at 1227-8." Page 4, opening brief of petitioner, STARBASE PUBLISHING CO.

Despite the apparent significant facial encroachment on protected expression caused by the statutory reference to "standards of decency," the court, although acknowledging that petitioners had raised a significant question, refused to adjudicate the constitutional questions which were concededly properly before it. The court concluded that

> ". . . before the constitutional issue can be resolved, the interpretation of the critical word must be left to state courts. As the final arbiters of the Texas Legislature's intent, *state courts deserve the first opportunity* to decide if the Legislature intended to hold obscenity defendants to the community's norms of 'proper' behavior and 'taste' as opposed to a minimum standard of conduct the community is willing to tolerate." *Id.* at 1029. (Emphasis added.)

The court concluded that because limiting jury instructions *might* be formulated consistent with both the First Amendment and § 43.21(a)(4), the statute was not unconstitutional on its face and that furthermore, the state should have the first attempt at both interpreting and construing the challenged language. Therefore, the court abstained vis-a-vis this issue, stating:

> "[T]he pendency of ongoing state criminal proceedings in which the issue may be resolved and the potential for narrowing state court constriction [sic] move us to refrain from entering the fray in a facial challenge to this statute." *Id.* at 1029.

2. Petitioner challenged the statutory presumptions as violative of due process in that they were not based on a logical connection between the fact proved and the fact presumed. *Leary v. United States*, 395 U.S. 6 (1969). Petitioner, as aforesaid, relying on *Smith v. California, supra*, also challenged the presumptions on First Amendment

grounds in that they effectively eliminated the requirement of proof of scienter. The court acknowledged that

> ". . . application of either presumption individually or the confluence of both presumptions could deny a criminal defendant due process or impermissibly burden First Amendment rights by dispensing with the necessity of proving scienter."

However, the court nonetheless abstained giving

> "[t]he state courts of Texas . . . the opportunity to determine in the first instance how these presumptions shall operate in the state's regulatory scheme." *Id.* at 1032.

The court again viewed as salutary the potential for state court formulation of jury instructions to eliminate "any conflict between the application of the presumption and due process and First Amendment requirements." *Id.* at 1032.

B. Abstention Is the Exception Rather Than the Rule, and Is Particularly Inappropriate Where, as Here, Legislation Is Challenged as Facially Overbroad.

The *sua sponte* decision of the court of appeals to abstain is contrary to settled precedents of this Court and congressional policies. The effect of the court's conclusion is that petitioners, who concededly have validly invoked federal jurisdiction and stated a ripe case or controversy, have been remanded to the never-never-land ". . . between the Scylla of intentionally flouting state law and the Charybdis of foregoing what [they] believe[s] to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding." *Steffel v. Thompson*, 415 U.S. 452, 463 (1974) (citations omitted). The court's decision exacerbates the problem prophesied by this Court because despite the fact that petitioners herein have been for almost two years seeking their day in court so that the challenged legislation will be definitively scrutinized by federal courts, the court of appeals *now requires them to be prosecuted* and convicted

so the Texas Court of Criminal Appeals may render a construction. *See* Point I, C, *infra*. The statutes are being enforced; many prosecutions are being brought; nonetheless, as of November 21, 1981—more than two years after the commencement of this litigation—not a single appellate decision has been rendered involving a case brought pursuant to the challenged statutes.

The implied suggestion that petitioners seek declaratory relief in the Texas courts—even if such were available—has been repeatedly rejected by this Court. The court of appeals implicitly suggested that where parallel affirmative state remedies are available, they should be utilized in the first instance. In *Monroe v. Pape*, 365 U.S. 167 (1961), this Court held that a federal plaintiff need not initiate state proceedings before filing a § 1983 action. *Accord, Wooley v. Maynard*, 430 U.S. 705 (1977): "*Younger* principles aside, a litigant is *entitled* to resort to a federal forum in seeking redress under 42 U.S.C. § 1983 for an alleged deprivation of federal rights." 430 U.S. at 710 (emphasis added).

This Court has continually asserted that abstention is the exception and not the rule, sanctioned only in narrowly limited "special circumstances" and particularly inappropriate where legislation is challenged as being facially overbroad and repugnant to the First Amendment. *See, Zwickler v. Koota*, 389 U.S. 241 (1967); *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Steffel v. Thompson*, 415 U.S. 452 (1974); and *Wisconsin v. Constantineau*, 400 U.S. 433 (1971).

The challenged statute is simply neither ambiguous nor uncertain and is thus *not* a proper candidate for federal court abstention. Its language is clear and does not involve a complex scheme of interrelated regulations, state constitutional provisions or definitional support from related laws. Petitioners have never challenged on vagueness grounds the portions of the Texas statute with respect to which the court

of appeals abstained. Also of particular significance is the failure of respondents to suggest at any time in this litigation that the challenged legislation was anything but clear and precise, or that state court construction could narrow the statute.

In two recent cases, this Court, by a substantial majority and over strong dissents which counseled abstention, upheld federal trial court adjudications of constitutional challenges to previously unlitigated state statutes which on their face or as applied dealt with obscenity. In *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980), declaratory relief was sought with respect to the constitutionality of several Texas quasi-obscenity statutes which had never been used but use of which had been threatened by state prosecutors. No state judicial constructions had been rendered. Both the district court and the court of appeals had to analyze, interpret and in some instances construe the subject legislation bereft of any dispositive state court assistance. *See Id.*, at 309 n. 1, 312-314 nn. 4-6 and 8, 316 n. 14. Nonetheless, this Court, with only Chief Justice Burger and Justice Powell dissenting in favor of abstention, affirmed the court of appeals.

The Chief Justice, dissenting,

> ". . . would [have dismissed] the appeal for failure to present a real and substantial controversy 'of the immediacy which is the indispensible condition of constitutional adjudication.' . . . Alternatively [he] would [have abstained] from decision until the Texas courts interpret the challenged statute. [He] would not [have reached] the merits of this 'dispute' at this stage." *Id.* at 317-318 (citations omitted).

Chief Justice Burger argued that

> ". . . the need for constitutional decision would be obviated in this case by permitting the Texas court an opportunity to interpret Texas law." *Id.* at 319.

He then discussed several assumptions vis-a-vis Texas law which were made by the court of appeals which were critical to the decision upheld by this Court. The Chief Justice concluded his dissent noting that

> ". . . I am unwilling to join the Court in 'umpiring' an empty debate on a question of Texas law on which the Texas courts have not yet had an opportunity to speak." *Id.* at 320.

This Court recently affirmed a decision of the Court of Appeals for the Ninth Circuit which upheld a district court determination that a Washington anti-obscenity statute was unconstitutional. *Brockett v. Spokane Arcades, Inc.*, ____ U.S. ____, 50 U.S.L.W. 3373 (November 9, 1981). In *Brockett*, the federal plaintiffs filed an affirmative to new sweeping anti-obscenity state legislation on the eve of its effective date and before it had ever been applied. The federal trial court refused to abstain and held the statute unconstitutional. The court of appeals affirmed.

Echoing his dissent in *Vance, supra*, the Chief Justice, joined by Justices Powell and Rehnquist, dissented from this Court's affirmance. The dissent favored a mandatory state court "first look" approach:

> "[T]he policies of federalism and comity militate in favor of affording state judges — who are as capable as are federal judges of enforcing the Constitution of the United States, and have taken the same oath to do so — the initial opportunity to consider the *scope* and *validity* of state statutes. This is particularly so when the state law under consideration has never been applied, and when its interpretation is uncertain; in such a case the state court's construction of the statute may obviate the need for adjudication of the federal constitutional issues, or the state court may resolve those issues as we would. . . .
>
> ". . . In sum, both the District Court and the Court of Appeals should have declined to act until the parties

> had exhausted available state remedies, at least absent a showing that resort to the state courts would have been futile. There was no need whatever for federal courts to render a declaratory judgment as to the *validity* of a state law on which the state courts had not yet had an opportunity to speak and on behalf of parties against whom the law has not yet been applied." ____ U.S. ____, 50 U.S.L.W. at 3373 (emphasis added).

In both *Vance* and *Brockett* as well as this case, the federal plaintiffs were engaging in conduct presumptively protected by the First Amendment and whose conduct was threatened by the application of state anti-obscenity legislation which had not been previously enforced in or construed by the state courts. In all three cases the federal plaintiffs had properly invoked federal jurisdiction in asserting their challenges to the statute on overbreadth grounds. In *Vance* and *Brockett*, the federal plaintiffs obtained the adjudication of their claims in the forum of their choice, despite there being no prior authoritative state construction of the subject legislation. Petitioners, however, whose legal posture is indistinguishable from the *Vance* and *Brockett* plaintiffs, have after more than two years since the judgment below, been deprived of a ruling on the merits by the federal judiciary in connection with constitutional challenges which the court of appeals characterized as "significant."

At all stages of this litigation, petitioners have vigorously challenged the new Texas obscenity law as overbroad on its face, asserting that its mere existence severely chills the exercise of First Amendment rights. As heretofore set forth, there is a substantial semantic difference between concepts of "tolerance" and "standards of decency," which underlies petitioners' challenge to § 43.21(a)(4). The difference between those two terms and the resulting impermissible expansion of the reach of the statute unquestionably inhibits free expression and compels self-imposed restraint in response to the fear of being prosecuted for dissemination of

material which would otherwise be entitled to constitutional protection.

In assessing the potential harm caused by its decision to abstain, the court focused only on criminal law matters, concluding:

> "[T]here is ample room to formulate jury instructions that comport with section 43.21(a)(4) and the First Amendment rights of defendant [sic] charged with obscenity offenses." 648 F.2d at 1029.

In making that assumption, the court is, it is respectfully submitted, likely incorrect. At oral argument below, it was pointed out that Texas trial courts will not deviate from statutory language in their instructions absent a binding construction from the Texas Court of Criminal Appeals. More important from the prospective of measuring the asserted "chilling effect," is the evil rendered by this overbroad statute even *prior* to a jury trial. The overbroad standard would be utilized by law enforcement officials and members of the judiciary long before a jury or other trier of fact were to gauge the subject material.

Using the statutory definitions — even if only for probable cause purposes — police officers and prosecutors will make significant initial determinations of whether the subject material violates the state obscenity law. Thus, to the extent that the statute is overly broad in its scope, the law enforcement personnel, sworn to enforce criminal legislation on its face, will reach as far as the law requires or permits them to and will of necessity purchase or seize material which they believe is statutorily obscene and initiate prosecutions based on such determinations. Similarly, pretrial motions to suppress and quash will be determined, not on the basis of presently nonexistent innovative jury instructions, but surely on the basis of the uninterpreted presently written statutory language.

Furthermore, the Court's assumption that Texas trial courts will formulate jury instructions to satisfy and/or vin-

dicate petitioners' constitutional concerns, is, it is respectfully submitted, simply unfounded. Experience compels the conclusion that prosecutors will unquestionably request and be granted jury instructions which conform to the present statutory language, both in order to vindicate legislative intent and to gain the adversarial advantage intended to be conferred on prosecutors by the Legislature in adopting the challenged innovative statutory language. Thus, in response to the expanded reach of the authorities, distributors of materials with sexual depictions or descriptions will self-censor—not to the limits of protected expression guaranteed by the First Amendment but to the more confining boundaries permitted by the statute. Accordingly, petitioners and First Amendment principles generally will suffer immeasurable harm during this abstention-induced period of judicial limbo.

C. There Is Neither an Adequate nor Available State Forum in Which to Obtain an Authoritative State Court Construction.

The court of appeals was ambiguous as to the source of the desired statutory construction. Neither the criminal nor civil courts in Texas can provide petitioners with an adequate available means of obtaining such a construction. Accordingly, it is futile to remand them to Texas state judicial forums.

(1) There Is No Opportunity Under Texas Law to Obtain a Civil Declaratory Judgment Authoritatively Construing a State Penal Statute.

The court of appeals, in fn. 4 of its opinion, stated that it dismissed the complaints only to remove a perceived potential obstacle to the obtaining of declaratory relief by petitioners in the Texas state courts. *Id.* at 1025. Such dismissal was unnecessary because declaratory relief cannot be obtained in the Texas state courts where one seeks an authoritative construction of a state criminal statute.

Texas' judicial hierarchy is bifurcated into separate and distinct branches: one civil and the other criminal. Thus, criminal appeals are handled only by the Court of Criminal Appeals; the Texas Supreme Court has no jurisdiction over criminal matters. Similarly, decisions made by the Texas civil courts with respect to criminal law matters are *not binding* on either the Court of Criminal Appeals or the criminal trial courts. *Ex Parte Johnson*, 533 S.W. 2d 349 (Tex. Crim. App. 1976). Since actions for declaratory relief may be filed only in the civil courts and cannot be filed in criminal courts, *Ex Parte Conner*, 439 S.W. 2d 350 (Tex. Crim. App. 1969), the court's implied suggestion that petitioners seek declaratory relief in the state's civil courts is not helpful because even if diligently pursued, no authoritative construction of the subject legislation could be obtained.

(2) There Is Neither an Adequate nor Necessarily Available Remedy in the State Criminal Courts.

In light of the unavailability of civil declaratory relief in the Texas state courts, the court of appeals' decision to dismiss the actions forces petitioners to wait for a construction from the Court of Criminal Appeals which can only follow their being prosecuted and convicted. This procedure is highly prejudicial and constitutionally deficient. *Steffel v. Thompson, supra*. Its impact on petitioners is heightened by the consistent position of the Texas Court of Criminal Appeals that ". . . the constitutionality of a statute will not be determined in any case unless such determination is *absolutely necessary* to decide the case in which the issue is raised." *Ex Parte Salfen*, 618 S.W. 2d 766, 770 (Tex. Crim. App. 1981) (emphasis added).

Even if there were an available opportunity in the state criminal courts to obtain an authoritative construction of the statute (and there is not) such a remedy would be inadequate in any event. In such a context, petitioners would not have the ability to reserve federal constitutional questions while

simultaneously seeking state court authoritative constructions of the statutory provisions. *Compare, e.g., England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964). If a criminal defendant fails to raise federal challenges, he or she may well be giving up the only chance for overturning a criminal conviction. However, once the federal constitutional issues are resolved in the context of a state criminal proceeding, this Court has recently held[3] that collateral estoppel precludes the relitigating of those constitutional issues in any subsequent § 1983 action, regardless of whether the state court ruling correctly or incorrectly interprets federal constitutional law.

By forcing petitioners to look to the state courts for an authoritative statutory construction, the court of appeals has effectively (1) deprived petitioners of any guarantee that they will *ever* have a forum available to them in which they can litigate all the constitutional challenges presented in their federal complaint, and, (2) guaranteed that if petitioners ever obtain an authoritative state court construction of the statute, it will necessarily be rendered in the context of a criminal case where petitioners' federal constitutional challenges will have to be raised and where the rulings thereon will preclude, via collateral estoppel, independent federal court review of such federal constitutional issues.

D. Younger Concerns Should Have Played No Part in the "Abstention Calculus" Utilized by the Court of Appeals.

The court of appeals approved the trial courts' refusal to invoke both *Younger* and *Pullman* abstention, yet citing intervening post-trial circumstances, itself abstained for ambiguous reasons. Referring to "*Pullman*-influenced abstention" in a footnote to its introductory statement of the case (648 F.2d at 1025, fn. 4), and using *Pullman*-type state-

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[3] *Allen v. McCurry*, ___ U.S. ___, 101 S. Ct. 411 (1980).

ments throughout ["the present posture of this case counsels abstention on our part pending an opportunity for narrowing and clarifying state court construction" (*Id.* at 1025)], the court seems also to have relied to an unspecified degree in "the abstention calculus" on criteria based on *Younger v. Harris*, 401 U.S. 37 (1971). The court ultimately concluded that certain *Younger* criteria—insufficient of themselves to compel dismissal—when added to the *Pullman* concerns perceived by the court made the court's decision to abstain "prudent and proper." *Id.* at 1036. With all due respect to the court of appeals, this Court has never applied the principles of *Younger v. Harris* and its progeny to facts similar to those herein.

Focusing almost entirely on its reading of this Court's opinion in *Moore v. Sims*, 442 U.S. 415 (1979), the court of appeals overlooked the principal significance of *Younger*. Distilled from this Court's many *Younger* decisions are certain basic prerequisites for application of the doctrine: (1) a federal plaintiff who seeks to assert constitutional challenges to state legislation; (2) the pendency at the time of the initiation of the federal action or prior to "proceedings of substance on the merits" in the federal litigation, of a state court *judicial* proceeding in which the federal plaintiff (or one closely associated with such plaintiff) is a defendant; (3) the attempt by the federal plaintiff to affect or anull the status or result of the "pending" state proceeding; (4) an available forum where the federal plaintiff as a state defendant may assert its federal constitutional claims in the state proceeding.

The problems of comity which motivated this Court's decision in *Younger* were not those created by permitting a *potential* litigant to choose a federal rather than a state forum in which to assert a constitutional challenge to state legislation.

Nothing in the record evokes this Court's *Younger* teachings. The original complaints were filed prior to the effective

date of the challenged legislation; interim injunctive relief—later vacated—was granted by both the trial court and the court of appeals and remained in effect for more than four weeks after *judgment* had been entered by the district court. The court of appeals noted that the record did not reveal that any of the parties to this litigation were defendants in the criminal prosecutions filed after judgment below and which are presumably now pending in the criminal *trial* courts of Texas. Thus, at most, some unspecified other litigants may be able to assert petitioners' present challenges to the Texas legislation in defense of unspecified now pending criminal prosecutions. On these facts, this Court has never invoked *Younger* jurisdiction, nor would the *Younger* principles articulated by this Court either require or permit the invocation of *Younger*.

Younger is inappropriate herein because the *Younger* comity concerns come into play only when a federal litigant has the opportunity to assert its federal claim as a defendant in a state judicial forum in a proceeding which was pending at the time of the initiation of the federal litigation or shortly thereafter. The comity problems which even the most enlightened modern federalism is designed to ameliorate are not raised by permitting a party to challenge a state criminal statute in federal court while contemporaneously an unrelated defendant is being prosecuted in state court pursuant to the same statute and may challenge the statute on identical grounds in defense of the criminal prosecution.

The court of appeals recognized the apparent inapplicability of *Younger* in noting that ". . . none of the plaintiffs may have 'an opportunity to present their federal claims in the state proceedings,' " *Id.* at 1035 (citations omitted). However, it concluded that ". . . the widespread ongoing state proceedings should create the *opportunity* for the *state courts* to resolve the constitutional challenge[s] . . ." *Id.* (emphasis added). While the ongoing state proceedings *may* allow the state courts to resolve the challenges [and that is

by no means certain; *see* point I, C, *supra*], *petitioners* will not have the opportunity to assert those challenges and that is the critical difference. Because petitioners are not and will not be involved, *Younger* abstention is neither required nor permitted.

This Court made this critical distinction abundantly clear in *Moore v. Sims, supra,* in the paragraph following the one most heavily relied on by the court of appeals. In pointing out why the federal plaintiffs should have been required to assert their constitutional challenges in defense of ongoing state proceedings in which *they* were contemporaneously involved, this Court stated: "In sum, the only pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise the constitutional claims, and Texas law appears to raise no procedural barriers . . . ."[4] In footnote 12 which appears at the conclusion of the preceding sentence, *Juidice v. Vail,* 430 U.S. 327 (1977), was quoted:

> "Here it is abundantly clear that *appellees* had an opportunity to present *their* federal claims in the state proceedings. No more is required to invoke *Younger* abstention . . . . Appellees need be accorded only an opportunity to fairly pursue *their* constitutional claims in the ongoing state proceedings . . . ." (Citations omitted; emphasis added; original emphasis omitted.) *Id.* at 2381.

No state prosecution having been pending until long after the trial court judgments were entered herein, no plaintiffs being involved as defendants and thus able to assert federal claims in defense of post-judgment criminal prosecutions *now* pending in state court, the doctrine of *Younger v. Harris, supra,* simply has no application herein and thus truly adds nothing to the "calculus of abstention" utilized by the court of appeals.

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[4]Of course, in this case, Texas law imposes insurmountable barriers; *see* point I, C, *supra*.

E. Having Abstained From Adjudicating Petitioners' Constitutional Claims, the Court of Appeals Should Have Issued Interim Relief Until an Acceptable Limiting Construction Was Obtained.

The court of appeals, having decided to abstain, and noting that "[O]rdinarily, *Pullman*-influenced abstention dictates a remand of the case to the continuing jurisdiction of the district court," nonetheless ordered the relevant claims dismissed without prejudice. 648 F.2d 1025, fn. 4.

In abstaining, the court neither granted interim relief to petitioners nor remanded to the district courts to allow petitioners to seek relief there. Such relief is necessary in order to protect and vindicate First Amendment rights pending the ultimate constitutional adjudication by the federal courts following the hoped for statutory construction that may some day be rendered by the Texas Court of Criminal Appeals. The *dismissal* further rendered the court below and the district courts powerless to issue any such relief that might be appropriate at present or become so in the future.

Such interim relief is unquestionably available. *Harrison v. NAACP*, 360 U.S. 167 (1959): "[T]he District Court . . . possesses ample authority in this action, or in supplemental proceedings as may be initiated, to protect the appellees while this case goes forward." 360 U.S. at 179; also cited with approval in *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289 (1979), where after determining that *Pullman* abstention was proper, this Court stated:

> "It has been suggested that the impact of abstention on appellees' pursuit of constitutionally protected activity should be reduced by directing the District Court to protect appellees against enforcement of the state statute pending a definitive resolution of issues of state law by the Arizona courts . . . but this is a matter that is best addressed by the District Court in the first instance." *Id.* at 312, n. 18.

Without the dismissal, the court could have abstained but issued its own equitable order, perhaps in the form of a preliminary injunction pending appeal pursuant to Rule 8, Federal Rules of Appellate Procedure and 28 U.S.C. § 1651. The court might also have remanded the cases to the district courts with instructions to issue appropriate equitable relief or, in the alternative, merely to consider the propriety of granting interim relief pending resolution of whatever state issues may be forthcoming. In the face of the said dismissals, the petitioners have the worst of all worlds; they have no relief, they have no resolution, and no prospects of imminent resolution.

Recently, in *Metromedia Inc. v. City of San Diego*, ___ U.S. ____, 101 S. Ct. 2882 (1981), this Court after finding an ordinance in conflict with the First Amendment, remanded the case noting that "without the benefit of limiting construction, the statutory provisions . . . are void on their face; until an acceptable limiting construction is obtained, the provisions cannot be applied." *Id.* at 2898, fn. 26, citing *Dombrowski v. Pfister*. Similarly, the court of appeals could and should have enjoined enforcement of the statute pending a limiting construction in state court.[5]

It is respectfully submitted that once having abstained, the court's failure to grant interim relief and its precluding

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[5]*See also Sovereign News Co. v. Corrigan*, 610 F.2d 428 (6th Cir. 1980), for a court of appeal disposition more solicitous of First Amendment principles and the rights of federal plaintiffs than that adopted by the court herein. There, following the striking of certain Ohio obscenity legislation by a federal district court, but before hearing in the court of appeals, the Ohio Supreme Court itself considered and construed the same statute. The court of appeals, given an *actual* state court construction as opposed to the *potential* construction relied on herein, did not abstain or vacate the district court judgment, but merely remanded for further proceedings. Thus appropriate concern was manifested for federal-state relations, but the federal plaintiffs and First Amendment principles remained protected.

the granting of such relief by the district courts is in conflict with the decisions of this Court, and the policies motivating those decisions.

II.

PLENARY REVIEW OF THE COURT OF APPEALS' DECISION TO GIVE BINDING EFFECT TO THIS COURT'S PRIOR DISMISSAL FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION IN SEWELL v. GEORGIA, WOULD PROVIDE MUCH NEEDED GUIDANCE TO LOWER COURTS CONCERNING THE NEED TO ATTRIBUTE PRECEDENTIAL IMPACT TO SUCH DECISIONS ONLY AFTER THE MOST CAREFUL COMPARISON AND SCRUTINY OF THE FACTS AND LEGAL ISSUES PRESENTED IN BOTH CASES.

Texas Penal Code §§ 43.21 and 43.23 make it a crime, *inter alia*, to "sell, give, provide, lend . . . or advertise" an "obscene device". T.P.C. § 43.21(a)(7) defines an "obscene device" as "a device including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of the human genital organs."[6]

Asserting both the rights of its patrons and its own rights as a corporation selling materials potentially within the ambit of the statute, petitioners asserted below that the challenged legislation was and is facially invalid for two separate and distinct constitutional reasons: First, petitioners asserted that the proscription of the statute serves no legitimate governmental interest and is violative of petitioners' and their patrons' fundamental rights to privacy in intimate activities. Second, petitioners asserted that the definition of "obscene device" contained in the statute is impermissibly vague as there is a broad range of materials, *e.g.* vibrators and massaging devices, concerning which reasonable men may dis-

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[6]On its face the statute bans not only items having the appearance of genitals, but also *any* device, however neutral or inoffensive in appearance, that might be perceived as being designed to stimulate "genital organs".

agree upon whether they are or are not within the ambit of the statute.

The court of appeals concluded that it was bound to reject petitioners' challenges to the "Obscene Device" provision in reliance upon this Court's previous dismissal for want of a substantial federal question in *Sewell v. Georgia*,[7] 435 U.S. 982 (1978). The court made no mention of petitioners' privacy challenge to the statute but necessarily rejected it in denying petitioners injunctive relief. Petitioners respectfully submit that the court of appeals erred in concluding that it was bound by the summary dismissal in *Sewell v. Georgia*, and offer the following three arguments in support of their assertion.

First, the court of appeals' opinion ignored this Court's admonition expressed in *Mandel v. Bradley*, 432 U.S. 173 (1977) that binding effect should be given only to "the precise issues presented and necessarily decided"[8] in a summary dismissal. As Justice Brennan pointed out in his concurring opinion, the only way a lower court can ascertain "the precise issues presented and necessarily decided" in a prior action is by examination of the jurisdictional statement in the earlier case in order to determine (1) if the constitutional questions presented were identical to those in the ongoing action and (2) whether the judgment arguably could have been based upon some alternative non-constitutional ground. As the court of appeals neither was provided with nor made any mention of the jurisdictional statement in *Sewell*, it unjustifiably relied on *Sewell* as binding authority for rejection of the broad based constitutional challenge presented by petitioners.

Second, the vagueness challenge to the statute in *Sewell* was necessarily different from that urged by petitioners

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[7]In *Sewell*, this Court dismissed an appeal from an individual who was convicted of a violation of Georgia's "obscene device" law. The defendant had asserted that the statute was impermissibly vague.

[8]432 U.S. at 176.

herein. Although the language used in the Georgia and Texas statutes is substantially similar, this Court's rules of standing *precluded* the convicted criminal defendant in *Sewell* from arguing that the statute was vague as applied to any conduct other than his own.[9] As the dissenting opinion of Justices Brennan and Marshall in *Sewell* makes clear, the particular device involved in *Sewell* was an "artificial vagina" [435 U.S. at 983]. As applied to an "artificial vagina" the Georgia statute was not vague. This does not mean, however, that the statute is not vague as applied to *other* items not involved in *Sewell* such as hand-held massaging devices, vibrators, or other items which could be perceived as instruments of human titillation. Since petitioners, not being defendants in a criminal case, have standing to challenge the broad sweep of the statute as applied to *any* of the items potentially available for sale, this Court's ruling on the vagueness of the Georgia statute as applied in *Sewell* is not binding constitutional precedent on the question of the vagueness of the Texas statute as applied to the unlimited range of materials available to petitioners for retail distribution. Accordingly, the court erred in concluding that this Court's summary dismissal in *Sewell* required a rejection of petitioners' vagueness challenge to the Texas "obscene device" statute.

Third, the court of appeals erred in rejecting without discussion petitioners' *privacy* challenge on behalf of themselves, their potential customers, and all others similarly disposed, to the Texas "obscene device" statute. In *Mandel v. Bradley*, 432 U.S. 173, 176 (1977), this Court held that "[s]ummary actions . . . should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved." This Court has *never* given plenary review to the question of whether

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[9]*See e.g. Broadrick v. Oklahoma*, 413 U.S. 601, 608 (1973) and *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 58-59 (1976).

there exists a constitutional right of privacy broad enough to prevent government from banning the dissemination to consenting adults of non-harmful sexually stimulating paraphernalia.[10]

Since this Court has never ruled on the aforementioned constitutional question in a written opinion, the court of appeals necessarily strayed from this Court's holding in *Mandel* that summary actions "should not be understood as breaking new ground". [432 U.S. at 176].

Finally, the Eighth Circuit Court of Appeals very recently concluded that a similar "obscene device" statute is constitutionally defective on vagueness grounds, as challenged in an affirmative action by an adult bookstore owner. *Postscript Enterprises, Inc. v. Whaley*, 658 F.2d 1249 (8th Cir. 1981).

In light of each of the three reasons set forth above and in order that the Fifth Circuit can consider the analysis of the Eighth Circuit rendered in *Postscript Enterprises, Inc., supra*, petitioners respectfully request that this Court vacate the court of appeals' opinion and direct the Fifth Circuit to reconsider the constitutionality of Texas' "obscene device" statute free from the restraint imposed by the court's erroneous preception of the controlling authority of this Court's summary dismissal in *Sewell v. Georgia*.

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[10]The Texas legislation bans dissemination of "obscene devices" by *all* persons, including licensed physicians, psychologists and marriage counselors.

Conclusion.

For the aforesaid reasons, the Court should grant the petition for writ of certiorari.

DATED: November 20, 1981.

Respectfully submitted,

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APPENDIX A.

Opinion of the Court of Appeals for the Fifth Circuit.

United States Court of Appeals, Fifth Circuit, Unit A.

Red Bluff Drive-In, Inc., Etc., et al., Plaintiffs-Appellants, v. Carol Vance, Harris County District Attorney, et al., Defendants-Appellees. Crystal Theater, Inc., a Texas Corporation, et al., Plaintiffs-Appellants, v. Henry Wade, District Attorney for Dallas County, Texas in representative capacity only, et al., Defendants-Appellees. Nos. 79-3182, 79-3570.

June 23, 1981.

Appeals from the United States District Court for the Southern District of Texas.

Appeal from the United States District Court for the Northern District of Texas.

Before AINSWORTH, CHARLES CLARK and WILLIAMS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

In 1979 the Texas Legislature rewrote the state's penal code provisions defining and regulating obscene materials and performances.[1] Shortly before the statute was due to go

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[1]Title 9, subchap. B., of the Texas Penal Code as amended, reads:

SUBCHAPTER B. OBSCENITY

§ 43.21. Definitions

(a) In this subchapter:

(1) "Obscene" means material or a performance that:

(A) the average person, applying contemporary community standards, would find that taken as a whole appeals to the prurient interest in sex;

(B) depicts or describes:

(i) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, including sexual intercourse, sodomy, and sexual bestiality; or

(ii) patently offensive representations or descriptions of masturbation, excretory functions, sadism, masochism, lewd exhibition of the genitals, the male or female genitals in a state of sexual stimulation or arousal, covered male genitals in a discernibly turgid state or a device designed and marketed as useful primarily for stimulation of the human genital organs; and

(footnote continued on following page)

into effect, entrepreneurs in the "adult entertainment" business brought several separate suits against Texas law enforcement officials to enjoin prosecutions under the revised statute. The suits also sought declaratory judgments that the statute was unconstitutional. In two separate memorandum opinions, federal district courts for the Northern and the Southern Districts of Texas denied the requested relief. The appeals from these rulings were consolidated for oral argument and for our decision here.

(C) taken as a whole, lacks serious literary, artistic, political, and scientific value.

(2) "Material means anything tangible that is capable of being used or adapted to arouse interest, whether through the medium of reading, observation, sound, or in any other manner, but does not include an actual three dimensional obscene device.

(3) "Performance" means a play, motion picture, dance, or other exhibition performed before an audience.

(4) "Patently offensive" means so offensive on its face as to affront current community standards of decency.

(5) "Promote" means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same.

(6) "Wholesale promote" means to manufacture, issue, sell, provide, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, or to offer or agree to do the same for purpose of resale.

(7) "Obscene device" means a device including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs.

(b) If any of the depictions or descriptions of sexual conduct described in this section are declared by a court of competent jurisdiction to be unlawfully included herein this declaration shall not invalidate this section as to other patently offensive sexual conduct included herein.

§ 43.23. Obscenity

(a) A person commits an offense if, knowing its content and character, he wholesale promotes or possesses with intent to wholesale promote any obscene material or obscene device.

(b) An offense under Subsection (a) of this section is a felony of the third degree.

(c) A person commits an offense if, knowing its content and character, he:

(1) promotes or possesses with intent to promote any obscene material or obscene device; or

(2) produces, presents, or directs an obscene performance or participates in a portion thereof that is obscene or that contributes to its obscenity.

(footnote continued on following page)

The able trial judges, facing the task of adjudicating challenges to the constitutionality of a state statute, were confronted in these cases with a multiplicity of parties, threshold procedural niceties, and substantive legal theories.[2] Both judges determined that jurisdiction lay in their respective courts and both declined invitations to invoke abstention. Each judge parsed the statute passage by passage and determined that the Texas Legislature's effort to regulate commercial "obscenity" consistent with constitutional guarantees of liberty passed muster.

We affirm the judgments below in all but three particulars. The portions of each judgment upholding the constitutionality of § 43.21(a)(4), § 43.21(a)(5), and § 43.23(e) & (f) are vacated. We determine that, although each of these provisions presents a troublesome question of constitutional law, a decision on the merits would be inappropriate at this

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(d) An offense under Subsection (c) of this section is a Class A misdeameanor.

(e) A person who promotes or wholesale promotes obscene material or an obscene device or possesses the same with intent to promote or wholesale promote it in the course of his business is presumed to do so with knowledge of its content and character.

(f) A person who possesses six or more obscene devices or identical or similar obscene articles is presumed to possess them with intent to promote the same.

(g) This section does not apply to a person who possesses or distributes obscene material or obscene devices or participates in conduct otherwise prescribed* (* So enrolled in bill; probably should read "proscribed.") by this section when the possession, participation, or conduct occurs in the course of law enforcement activities.

[2]The litigation in the Southern District of Texas took the form of three separate lawsuits consolidated for hearings on preliminary relief and for trial on the merits. The plaintiffs included at least twenty separate business entities and one individual. The complaints named twenty-two local law enforcement officials from seven different Texas counties and the Attorney General of Texas. The litigation in the Northern District involved five original plaintiffs, six original defendants, and two intervenors. Before reaching the merits, the trial courts had to resolve venue challenges, troublesome standing questions, and the applicability of various abstention doctrines. To compound these vexing conundrums, both judges faced severe time pressures because the suits were filed very shortly before the impeding effective date of the newly enacted statute.

time.[3] The present posture of this case counsels abstention on our part pending an opportunity for narrowing and clarifying state court construction. Therefore, we vacate the judgments below as to these three provisions and dismiss the claims raised against them without prejudice.[4]

I. THE CONSTITUTIONALLY VALID PROVISIONS

Plaintiffs attack the challenged statutes from several angles. They maintain that some provisions are unconstitutionally vague or overbroad or both. They complain that certain provisions threaten those charged under the statute with denials of procedural due process and that other provisions infringe upon fundamental rights of expression and personal autonomy. They assert that the statute, by outlaw-

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[3]In reaching the merits of the judgments below to affirm the constitutionality of most of the Texas obscenity statute while abstaining from an adjudication of the three provisions discussed in Part I, *infra*, we reach a result analogous to the Supreme Court's partial abstention in *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 99 S. Ct. 2301, 60 L.Ed.2d 895 (1979). In *Babbitt*, the Supreme Court reviewed the decision of a three-judge district court striking down Arizona's statute regulating agricultural labor-management relations. In reversing the district court's judgment, the Supreme Court determined that the district court should have abstained from adjudicating the constitutionality of the criminal penalty and consumer publicity provisions of the Arizona statute pending review by state courts, 442 U.S. 305, 99 S.Ct. at 2312, but reached the merits of the challenge to decide that the statutory representation election procedures were constitutionally sound. 442 U.S. 312, 99 S.Ct. at 2316-17.

[4]Ordinarily, *Pullman*-influenced abstention dictates a remand of the case to the continuing jurisdiction of the district court. *Zwickler v. Koota*, 389 U.S. 241, 244 n.4, 88 S.Ct. 391, 393, n.4, 19 L.Ed.2d 444 (1967). Texas courts, however, will not grant declaratory relief if a claim is remanded in this posture. *United Services Life Ins. Co. v. Delaney*, 396 S.W.2d 855 (Tex. 1965). See also *Ex parte Green*, 548 S.W.2d 914 (Tex.Cr.App. 1977). Therefore, in order to remove any obstacles to an adjudication of the plaintiff's rights in state courts and to assure the availability of a federal forum should the state adjudication prove unsatisfactory, we dismiss these claims without prejudice. *Harris County Comm'rs Court v. Moore*, 420 U.S. 77, 88 n.14, 95 S.Ct. 870, 878 n.14, 43 L.Ed.2d 32 (1975); *Abell v. Frank*, 625 F.2d 653, 658 n.9 (5th Cir. 1980).

ing the sale or possession in quantity of sexually stimulative materials and devices, denies equal protection of the laws to handicapped persons dependent on these items for sexual gratification.

The district courts rejected each of these assaults on the statute. Except for the modifications we discuss, *infra*, regarding §§ 43.21(a)(4), 43.21(a)(5), and 43.23(e) & (f), we affirm the judgments below. Most of the statute is firmly grounded in language prescribed or approved in prior Supreme Court obscenity decisions.

Section 43.21(a)(1) defines obscenity with language drawn directly from the Supreme Court's landmark *Miller* decision[5] The section recites, with little variation, the familiar three-part *Miller* test for determining the boundary between protected expression and regulable obscenity. Under the *Miller* test, expression goes beyond the limits of First Amendment protection if it: (1) taken as a whole, appeals to the prurient interest; (2) depicts or describes specified sexual conduct in a patently offensive way; and (3) taken as a whole, lacks serious literary, artistic, political, or scientific value. 413 U.S. at 24, 93 S.Ct. 2614. Except for §§ 43.21(a)(4), 43.21(a)(5), and the presumptions contained in § 43.23(c) & (f), the Texas statute's deviations from the *Miller* standard are constitutionally unobjectionable. We review them briefly.

§ *43(a)(1)(A)*—The plaintiffs ("Red Bluff") complain of the statute's lack of a definition for the term "prurient interest" in § 43.21(a)(1)(A). Noting that jury charges in Texas obscenity cases customarily repeat the statutory lan-

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[5]*Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). *Compare Miller*, 413 U.S. at 24, 93 S.Ct. at 2614 (setting forth the conjunctive three-element test delimiting the scope of obscene expression unprotected by the First Amendment) *and id.* 30-34 (holding the three-element test must be applied with reference to "the average person, applying contemporary community standards") *with* Texas Penal Code § 43.21(a)(1), reprinted *supra* n.1.

guage verbatim, Red Bluff expresses concern that juries will decide these cases without the benefit of an instruction defining "prurient interest in sex" as "a shameful or morbid interest." *See Miller v. California*, 413 U.S. at 16 n.1, 93 S.Ct. at 2611 (1973) (quoting the definition of prurient interest in California Penal Code § 311(a) (1969). Yet, the lack of a definition for the term "prurient interest" does not render the statute constitutionally deficient. Many jurors may find it helpful to learn that "prurient interest" means shameful and morbid, but no conviction has, to our knowledge, been overturned for the trial court's failure to so instruct a jury. Moreover, Texas courts construing the provision are obliged to apply any "technical or particular meaning" the term has acquired from prior judicial review. *See* Texas Penal Code § 1.05(b); Tex.Rev.Civ.Stat.Ann. art. 5429b-2, § 2.01 (Vernon Supp.1980).

§ *43.21(a)(1)(B)(i)*—Red Bluff objects on vagueness and overbreadth grounds to the statute's specification of "sexual intercourse, sodomy, and sexual bestiality" as varieties of sexual conduct whose patently offensive depictions or descriptions may be found obscene. The list of potentially "patently offensive" acts in *Miller* did not include these three examples of sexual conduct, 413 U.S. at 25, 93 S.Ct. at 2615, but the *Miller* list was not intended to be exhaustive. *Hamling v. United States*, 418 U.S. 87, 114, 94 S.Ct. 2887, 2906, 41 L.Ed.2d 590 (1974). These additional terms yield a plain, ascertainable meaning; their addition reduces rather than increases the vagueness of the Texas statute. Nor by these additions to the *Miller* catalogue of forbidden depictions of sexual acts does the Texas statute sweep too broadly. Subsection 43.21(a)(1)(B)(i) is not constitutionally objectionable.

§ *43.21(a)(1)(B)(ii)*—This subsection specifies "sadism, masochism, lewd exhibition of . . . the male or female genitals in a state of sexual stimulation or arousal, covered

male genitals in a discernibly turgid state or a device designed and marketed as useful primarily for stimulation of the human genital organs'' as subjects whose patently offensive representations or depictions may be found obscene. *Miller* does not explicitly authorize this formula, but it does require specific definition of sexual conduct and offers ''lewd exhibition of the genitals'' as a generic example of a potentially obscene subject. 413 U.S. at 24-25, 93 S.Ct. at 2614-2615. The Texas statutory language focusing on stimulated, aroused, or turgid genitals follows the Oregon and Hawaii obscenity statutes cited—although not expressly approved— in *Miller* as examples of acceptable state regulation. 413 U.S. at 24 n.6, 93 S.Ct. at 2615 n.6 *citing* Or.Rev.Stat. §§ 255(5) & (11); Hawaii Penal Code § 712-1210(8). The Supreme Court has subsequently approved the inclusion of representations of sado-masochistic conduct as potentially obscene. *Ward v. Illinois,* 431 U.S. 767, 773, 97 S.Ct. 2085, 2089, 52 L.Ed.2d 738 (1977). The addition of masturbation aids does not significantly expand the *Miller* court's list of potentially obscene subjects, which included masturbation. 413 U.S. at 25, 93 S.Ct. at 2615. None of these deviations from the language in *Miller* constitutes a facial encroachment on Red Bluff's constitutional liberties.

§ *43.21(a)(1)(C)*—To be obscene under *Miller,* expression must lack ''serious literary, artistic, political, *or* scientific value.'' 413 U.S. at 24, 93 S.Ct. at 2614 (emphasis added). To be obscene under the Texas obscenity statute, expression must lack ''serious literary, artistic, political *and* scientific value.'' § 43.21(a)(1)(C) (emphasis added). The variance in conjunctions does not rise to a level of constitutional significance. *Miller* makes plain that serious redeeming value from the perspective of any of these four disciplines rescues a work from the unprotected status of obscenity. 413 U.S. at 21-22, 92 S.Ct. at 2613. Texas courts are bound to construe § 43.21(a)(1)(C) with this constitutional constraint in mind. *West v. State,* 514 S.W.2d

433, 438 (Tex.Crim.App.1974). The substitution of "and" for "or" in § 43.21(a)(1)(C) does not generate a facial threat to constitutional rights.

§§ *43.21(a)(2) & (3)*—These subsections define "material" and "performance," the synonyms substituted for the *Miller* test's term "work." The definition of "performance" tracks language in Hawaii Penal Code § 712-1210(4), a statutory example cited in *Miller*, 413 U.S. at 24 n.6, 93 S.Ct. at 2614 n.6. The definition of "material" follows New York Penal Law § 235.00(2), a statute that weathered the void-for-vagueness attack of *People v. Heller*, 33 N.Y.2d 314, 352 N.Y.S.2d 601, 307 N.E.2d 805 (1973), *cert. denied sub nom., Buckley v. New York*, 418 U.S. 944, 94 S.Ct. 3231, 41 L.Ed.2d 1175 (1974). While the Texas statute departs from the New York definition of "material" by excluding "actual three dimensional obscene devices," the departure is of no constitutional moment. Sections 43.21(a)(2) & (3) are neither unconstitutionally vague nor facially overbroad.

§ *43.21(a)(6)*—This subsection defines "wholesale promote," the conduct punishable as a third degree felony under § 43.23(b), in terms of various kinds of acts which have as their purpose the "resale" of obscene materials or devices. The catalogue of verbs used in the definition is drawn from New York Penal Law § 235.00(4), reviewed for vagueness and approved in *People v. Heller* The "resale" language confines the definition to commercial transactions. Therefore, this definition does not present the overbreadth threats inherent in § 43.21(a)(5)'s definition of "promote," discussed in Part II B, *infra*. Again, we perceive no facial constitutional infirmity.

§ *43.21(a)(7)*—This subsection defines devices—including dildos and artificial vaginas—"designed or marketed as useful primarily for the stimulation of human genital organs" as obscene per se. The language is patterned on

the Georgia obscenity statute. Ga. Code § 26-2101(c). In *Sewell v. State*, 233 S.E.2d 187 (Ga. 1977), the appellant challenged his conviction under the Georgia statute for selling an artificial vagina to an undercover police officer. The Georgia Supreme Court rejected his vagueness and overbreadth arguments and found no constitutional problem with the Georgia Legislature's prohibition on the sale of such devices. The United States Supreme Court dismissed Sewell's appeal for want of a substantial federal question. *Sewell v. Georgia*, 435 U.S. 982, 98 S.Ct. 1635, 56 L.Ed.2d 76 (1978). Thus, the constitutional propriety of the Texas counterpart to this Georgia obscenity provision is clear.

Plaintiff Gullick raises an equal protection claim on behalf of handicapped persons against prohibition on sales of sexually-oriented devices. However, the record on appeal is devoid of evidence supporting the assertions that, first, we should recognize a constitutional right in handicapped persons to the sexual devices proscribed by the statute and, second, that this right is burdened by the statute.[6] With nothing more than the naked legal conclusions on the record,

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[6]The evidence on this point consists of the following affidavit:

> My name is Henry Gullick. I live at 2422 Chamberlain, Houston, Texas. I am a paraplegic.
>
> The enforcement of House Bill No. 1741 will deny me my constitutional right to privacy and to a normal sexual life, which rights are guaranteed to me under the First Amendment to the Constitution of the United States. Under the conditions imposed by a literal reading of this act regarding "devices designed or marketed as useful primarily for the stimulation of human genital organs", I will not only be denied the right to purchase such devices but will also be denied the right to possess or use such devices within the privacy of my home. In addition, I am fearful that I will be threatened with criminal prosecution for exercising rights that are protected by the First Amendment to the Constitution of the United States if this act is enforced. . . .
>
> /Signed
> Henry Gullick

we have no evidentiary basis to sustain the plaintiffs' proposed extension of the constitutional guarantee of personal autonomy. *See generally Roe v. Wade*, 410 U.S. 113, 152-53, 93 S.Ct. 705, 726, 35 L.Ed.2d 147 (1973). Further, the evidence is inadequate to support the contention that, assuming such a right exists, it is burdened by the statute.

As to the basic provision of the statute evaluated above, it follows that the decisions of the district courts upholding their validity are correct and should be affirmed.

II. THE QUESTIONABLE PROVISIONS

The judgments below do, however, require modification in three instances. We treat each with detailed consideration.

A. § 43.21(a)(4): *Defining "patently offensive" in terms of "community standards of decency"*

In its effort to track the contours of permissible state regulation, the Texas Legislature deviated subtly but significantly from the *Miller* formula in modifying the standard that factfinders must apply in deciding whether an item is "patently offensive." *Miller* teaches that the issues of patent offensiveness and appeal to the prurient interest are to be determined by factfinders assuming the perspective of "the average person, applying contemporary community standards." *Playboy Publications, Inc. v. McAuliffe*, 610 F.2d 1353, 1363 (5th Cir.), *cert. dismissed*, 447 U.S. 931, 100 S.Ct. 3031, 65 L.Ed.2d 1131 (1980).

Explaining the rationale behind reliance on community standards to define the scope of First Amendment rights, Justice Burger stated "[i]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found *tolerable* in Las Vegas, or New York City." *Miller v. California*, 413 U.S. at 32, 93 S.Ct. at

2619 (emphasis added) (footnote omitted). In a subsequent obscenity decision, the Court noted "community standards must be applied by juries in accordance with their own understanding of the *tolerance* of the average person in their community. . . ." *Smith v. United States*, 431 U.S. 291, 305, 97 S.Ct. 1756, 1766, 52 L.Ed.2d 324 (1977) (emphasis added). It would be easy to make too much of the Court's choice of words. Nevertheless, the line between protected expression and punishable obscenity must be drawn at the limits of a community's tolerance rather than in accordance with the dangerous standards of propriety and taste.

The revised Texas obscenity statute modifies this standard of jury review by defining "patently offensive" as "so offensive on its face as to affront current community standards of *decency*." § 43.21(a)(4) (emphasis added). The plaintiffs insist that this definition strays beyond the bounds of permissible regulation by substituting community standards of decency for community standards of tolerance. The substitution, Red Bluff maintains, expands the scope of regulation contemplated in *Miller* by banning not merely the expression a community regards as intolerable, but also the expression a community finds less than decent.[7]

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[7]The defendants find authority for § 43.21(a)(4) in language from a 1962 Supreme Court plurality opinion equating "patent offensiveness" with "indecency" and quoting an Australian jurist on the applicability of "current standards of decency" to obscenity adjudication. *Manual Enterprises v. Day*, 370 U.S. 478, 482-85, 82 S.Ct. 1432, 1434-36, 8 L.Ed.2d 639 (1962) *quoting Regina v. Close* [1948] Vict LR 445, 463 (Judgment of Fullagar, J.). The California jury trying Marvin Miller on obscenity charges was instructed that "in determining whether the [allegedly obscene] material 'goes substantially beyond the customary limits of candor and affronts contemporary community standards of decency,' it was to apply 'contemporary community standards of the State of California.' " *Miller v. California*, 413 U.S. at 31, 93 S.Ct. at 2618. The Supreme Court did not address the propriety of the "decency" component of this instruction in vacating Miller's conviction.

More recent Supreme Court pronouncements in the fluid area of obscenity jurisprudence cast doubt on the vitality of the language relied upon by the statute's defenders. *E.g.*, *Smith v. United States*, 431 U.S. at 305, 97 S.Ct. at 1766.

Whether Texas has exceeded its constitutional authority to regulate obscenity by defining "patently offensive" in terms of "decency" rather than "tolerance" is a significant question. But before the constitutional issue can be resolved, the interpretation of the critical word must be left to state courts. As the final arbiters of the Texas Legislature's intent, state courts deserve the first opportunity to decide if the Legislature intended to hold obscenity defendants to the community's norms of "proper" behavior and "taste" as opposed to a minimum standard of conduct the community is willing to tolerate. If on its face the statute warned too broadly, deference to the state courts would be inappropriate. Such is not the case here. There is ample room to formulate jury instructions that comport with § 43.21(a)(4) and the First Amendment rights of defendant charged with obscenity offenses. The pendency of ongoing state criminal proceedings in which the issue may be resolved and the potential for narrowing state court constriction move us to refrain from entering the fray in a facial challenge to this statute.

B. § 43.21(a)(5): *Defining the term "promote"*

In its effort to have draft a statute criminalizing every conceivable transaction in obscene materials or devices, the Texas Legislature defines "promote"—the act element of the offense prohibited in § 43.23(c)—in terms of nineteen different verbs. The sole modification to this far-reaching prohibition is § 43.23(g), which excepts transactions in the course of law enforcement activities.

There can be no doubt that the statutory definition of "promote," read in conjunction with the definitions of obscene materials in § 43.21(a)(2) and obscene devices in § 43.21(a)(7), can be read to sweep within its ambit acts

the state cannot criminalize. The literal language of the statute forbids the most sensitive and intimate conversations. For example, a husband could be found to have violated the letter of the statute by uttering in the privacy of the marital bedroom a verbal suggestion to procure for his wife one of the commercially available small appliances referred to as vibrators.[8] *But cf. Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969) (state regulation of possession of obscene materials in private residence held unconstitutional). A doctor could be found to have violated the letter of the statute by counseling his patient on surgical procedures for the implantation of a penile prosthesis. *But cf. Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (state restriction on the dissemination of birth control information from physician to patient held unconstitutional).

Numerous hypothetical circumstances can be projected in which the statute would be constitutionally overbroad if so applied. But the issue here is facial overbreadth, and, as the Supreme Court has observed, "facial overbreadth adjudication is an exception to our traditional rules of practice [whose] function [is] a limited one from the outset. . . ." *Broaderick v. Oklahoma*, 413 U.S. 601, 615, 93 S.Ct. 2908, 2917, 37 L.Ed.2d 830 (1973). Where, as here, the protected activity regulated by the state partakes more of conduct than of pure speech, the regulation will be invalidated only if the overbreadth is substantial "judged in relation to the statute's plainly legitimate sweep." *Id.* In balancing a statute's potential chilling effect on protected activity against the state's asserted interests in establishing

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[8]This hypothetical boudoir conversation is not as far-fetched as one might suppose. It was recently reported that sales of vibrators and related personal care massaging devices in the United States totalled $13.3 million on 830,000 units in 1979. ESQUIRE, July 1980, at 62.

the regulation, federal courts must proceed cautiously and refrain from facial adjudication "unless the statute is not readily subject to a narrowing construction by the state courts. . . " *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216, 95 S.Ct. 2268, 2276, 45 L.Ed.2d 125 (1975).

For the reasons discussed in Part III, *infra*, we do not reach the balancing task framed in this facial overbreadth challenge. If Texas law enforcement officials prosecute individuals under the hypothetical circumstances we have outlined, state courts construing §§ 43.21 & 43.23 will have the opportunity to find marital, medical, and other necessary exceptions narrowing the scope of § 43.21(a)(5)'s definition of promote.

C. § 43.23(e) & (f): *Presuming knowledge and intent from possession.*

To convict for the offenses described in §§ 43.23(a) & (c), the State must establish that a defendant *knew* the content and character of the proscribed item and that he *intended* to promote an obscene material or device. Subsections (e) and (f) of § 43.23 establish presumptions to aid the State in proving the knowledge and intent elements of the offense. Subsection (e) provides that one who possesses obscene materials or devices with intent to promote them is presumed to have knowledge of their character. Subsection (f) provides that one who possesses "six or more obscene devices or identical or similar obscene articles"[9] is presumed to possess them to promote them.

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[9]This language is ambiguous. It may be read to mean that possession of six devices or possession of as few as two "identical or similar" obscene books gives rise to the presumption. On the other hand, it may be interpreted to mean that six items—devices or units of printed matter—are required to trigger the presumption, but that, in the case of printed materials, there is imposed the additional condition that the items be "identical or similar." We leave for Texas courts the task of deciphering this cryptic passage.

Red Bluff complains that these presumptions are irrational, hence impermissible as violative of Fourteenth Amendment due process.[10] To withstand due process scrutiny, a statutory presumption establishing an element of criminal offense must rest on a logical connection between the fact proved and the fact presumed. *Leary v. United States*, 395 U.S. 6, 36, 89 S.Ct. 1532, 1548, 23 L.Ed.2d 57 (1969) ("A criminal statutory presumption . . . [is] unconstitutional unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.") Red Bluff insists that, in a commercial enterprise retailing hundreds or perhaps thousands of different books and magazines, there can be no reasonable expectation that a bookseller has examined each item or is knowledgeable about its contents. Red Bluff further questions the logical force behind the inference that one who possesses six obscene items must likely intend to provide them to others. *Cf. Vachon v. New Hampshire*, 414 U.S. 478, 94 S.Ct. 664, 38 L.Ed.2d 666 (1974) (state's failure to prove more than defendant's control of business premises where offensive item was sold to minor warrants reversal of conviction for willfully contributing to the delinquency of a minor; proof of control of premises does not establish the requisite knowledge or intent).

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[10]Because these plaintiffs have suffered neither the threat nor the reality of a criminal prosecution under these presumptions, their standing to assert—and our jurisdiction to decide—the claim is questionable. The issue we have jurisdiction to decide here, then, is merely whether the statutory presumptions are facially overbroad—*i.e.*, whether the presumptions inhibit the exercise of First Amendment rights by threatening a denial of due process. See n.18, *infra*. And while we have jurisdiction to decide that issue, the considerations set out in this opinion persuade us that we should not exercise it. See Part III, *infra*.

Red Bluff also attacks the § 43.23 presumptions on the ground that, working conjunctively, they eliminate the necessity of proving scienter. Obscenity statutes permitting criminal convictions without proof of scienter impose an unconstitutional burden on First Amendment rights. *Smith v. California*, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959) (reversing the conviction of a bookseller charged under a statute imposing strict criminal liability for sales of obscene materials). By allowing a jury to infer guilty intent from possession and guilty knowledge from possession coupled with guilty intent, Red Bluff argues, the statute stacks one presumption atop another to eliminate an effective scienter element of the crime. Put another way, it is urged that with these presumptions in operation, the State may satisfy its burden of proving that a person intended to sell items he knew to be obscene by showing mere possession of the outlawed materials.

Relevant to but not dispositive of this issue is the Supreme Court's dismissal of the appeal in *People v. Kirkpatrick*, 32 N.Y.2d 17, 343 N.Y.S.2d 70, 295 N.E.2d 753 (1973), *appeal dismissed for want of a substantial federal question sub nom., Kirkpatrick v. New York*, 414 U.S. 948, 94 S.Ct. 283, 38 L.Ed.2d 204 (1974). Kirkpatrick and his co-defendants were convicted of violating New York's obscenity statute, which contains statutory presumptions identical to §§ 43.23(e) & (f). On appeal, Kirkpatrick contended: (1) there was insufficient evidence to sustain a finding that the defendants knew the obscene character of the materials they were charged with selling; and (2) the statutory presumption of constructive knowledge flowing from possession was unconstitutional. The New York Court of Appeals affirmed the convictions on the alternative grounds that the evidence of actual knowledge was sufficient and that the presumptions were constitutional as applied. *People v. Kirkpatrick*, 32

N.Y.2d at 22, 343 N.Y.S.2d at 73, 295 N.E.2d at 756. Recognizing the precedential effect of a dismissal of an appeal under these circumstances,[11] we discern no definitive guidance on the validity of the presumptions from the Supreme Court's summary affirmance of the New York court's two-pronged holding.[12]

We are again led to abstain from adjudication on the merits of this facial challenge to §§ 43.23 (e) & (f). One can certainly imagine hypothetical cases in which the application of either presumption individually or the confluence of both presumptions could deny a criminal defendant due process or impermissibly burden First Amendment rights by dispensing with the necessity of proving scienter. The state courts of Texas, however, deserve the opportunity to determine in the first instance how these presumptions shall operate in the state's regulatory scheme. Texas courts may, in their formulation of jury instructions, obviate any conflict between the application of the presumptions and

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[11] *Mandel v. Bradley*, 432 U.S. 173, 176, 97 S.Ct. 2238, 2240, 53 L.Ed.2d 199 (1977) (summary dismissals reject jurisdictional challenges, leaving judgments on the merits undisturbed and precedential on their facts).

[12] Nor do we perceive a conclusive answer to the challenge to §§ 43.23(e) & (f) in our Circuit's validation of the presumption allowed by 18 U.S.C. § 1465 of an intent to sell from the knowing transportation of two or more obscene items. *See United States v. Hill*, 500 F.2d 733, 739-40 (5th Cir. 1974), *cert. denied*, 420 U.S. 952, 95 S.Ct. 1336, 43 L.Ed.2d 430 (1975). The analogy between the Texas statute and 18 U.S.C. § 1465 is tenuous. Logic justifies the drawing of more sweeping inferences about intent from proof of the deliberate carriage of an item in interstate commerce than from proof of mere possession. *Hill* simply decided a different question.

due process and First Amendment requirements.[13] *Cf. Mishkin v. New York*, 383 U.S. 502, 510, 86 S.Ct. 958, 964, 16 L.Ed.2d 56 (1966) (citing New York court's narrowing interpretation of statutory presumptions to prevent convictions for ignorant or unintentional trafficking in obscene books in *People v. Finkelstein*, 9 N.Y.2d 342, 344-45, 214 N.Y.S.2d 363, 174 N.E.2d 470 (1961)).

III. THE ABSTENTION ISSUE

Noting the absence of any pending state criminal proceedings at the time these suits were heard and authority counselling against abstention in suits challenging the facial constitutionality of state regulations, the district courts declined to abstain. The lack of an ongoing state criminal proceeding warranted the district courts' refusal to apply

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[13]Tex. Penal Code § 2.05 (Vernon Supp. 1980) minimizes the danger by prescribing rules for the operation of Penal Code presumptions:

§ 2.05. Presumption

When this code or another penal law establishes a presumption with respect to any fact, it has the following consequences:

(1) if there is sufficient evidence of the facts that give rise to the presumption, the issue of the existence of the presumed fact must be submitted to the jury, unless the court is satisfied that the evidence as a whole clearly precludes a finding beyond a reasonable doubt of the presumed fact; and

(2) if the existence of the presumed fact is submitted to the jury, the court shall charge the jury, in terms of the presumption and the specific element to which it applies, as follows:

(A) that the facts giving rise to the presumption must be proven beyond a reasonable doubt;

(B) that if such facts are proven beyond a reasonable doubt the jury may find that the element of the offense sought to be presumed exists, but it is not bound to so find;

(C) that even though the jury may find the existence of such element, the state must prove beyond a reasonable doubt each of the other elements of the offense charged; and

(D) if the jury has a reasonable doubt as to the existence of a fact or facts giving rise to the presumption, the presumption fails and the jury shall not consider the presumption for any purpose.

Younger abstention.[14] Moreover, in view of the high cost of abstention in the context of suits seeking review of statutes exerting a purported chilling effect on First Amendment rights, *see Procunier v. Martinez*, 416 U.S. 396, 404, 94 S.Ct. 1800, 1807, 40 L.Ed.2d 224 (1974), we cannot say that either district court abused its discretion in declining to invoke *Pullman* abstention.[15] Thus, our decision to abstain here should not be read as a reversal of the judgments before us for errors. Instead, in much the same way that circumstances arising between trial and appeal can moot a controversy, intervening circumstances have rendered abstention by this Court appropriate.

Since the first of these cases was heard and decided on the merits by the district court for the Southern District of Texas in September 1979, this Court[16] and the district court

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[14]*Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). *Younger* teaches that, absent a showing of bad faith or harassment by state officials or other exceptional circumstances meriting equitable relief, a federal court should refrain from rendering a decision that interferes with pending state criminal proceedings. *See generally* C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4252 (1978).

"Considerations of . . . comity in our federal system . . . have little force in the absence of a pending state proceedings." *Lake Carriers Association v. MacMullen*, 406 U.S. 498, 509, 92 S.Ct. 1749, 1756, 32 L.Ed.2d 257 (1972).

[15]*Railroad Comm. of Texas v. Pullman*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). *Pullman* teaches that a federal court should refrain from exercising jurisdiction over a constitutional challenge to state action if the resolution of an unsettled question of state law promises to dispose of the case without the need for constitutional adjudication. *See generally* C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4242 (1978).

A district court's discretionary decision to invoke—or to refrain from invoking—*Pullman* abstention is reversible only for an abuse of that discretion. *Chancery Clerk of Chicksaw County, Mississippi v. Wallace*, 646 F.2d 151 (5th Cir. 1981).

[16]A panel of this Circuit denied Red Bluff's motion for stay pending appeal. In an unpublished opinion dated October 12, 1979, the panel determined that the appellants had failed to meet the stringent preconditions for obtaining such a stay. *See Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1305, 96 S.Ct. 845, 847, 47 L.Ed.2d 67 (1976) (per Rehnquist, J., as Circuit Judge); F.R.A.P. 8. The panel did not address the merits of Red Bluff's appeal.

for the Northern District of Texas have denied temporary injunctive relief restraining law enforcement officials from bringing prosecutions under the statute in state courts. Consequently, criminal prosecutions have ensued and are pending.[17] The intervention of these ongoing state criminal proceedings adds a factor of significant weight to the abstention calculus we must face at this stage of the litigation.

It should be stressed that abstention here is not mandatory under *Younger* principles standing alone. Although *Younger* mandates abstention even when state criminal proceedings do not commence until after the federal suit is filed, *Hicks v. Miranda,* 422 U.S. 332, 349, 95 S.Ct. 2281, 2291, 45 L.Ed.2d 223 (1974), the district courts here have held "proceedings of substance on the merits" prior to the institution of state criminal proceedings. *But see id.* at 353, n.1, 95 S.Ct. at 2293, n.1 (Stewart, J., dissenting) (criticizing the majority's lack of clarity in delineating when the intervention of state proceedings forces federal courts to abstain). They were not bound to abstain. Further, the *Younger* doctrine does not preclude declaratory relief when the applicant is not currently involved in a state criminal prosecution. *Steffel v. Thompson,* 415 U.S. 452, 475, 94 S.Ct. 1209, 1223, 39 L.Ed.2d 505 (1974).

Rather, our abstention is an exercise of the discretion we enjoy as an equity court confronting a suit seeking equitable relief from the challenged statute. Justice Rehnquist, writing for the Supreme Court in *Moore v. Sims,* 442 U.S. 415, 428, 99 S.Ct. 2371, 2379, 60 L.Ed.2d 994 (1979), pointed out "three distinct considerations that counsel abstention when broad-based challenges are made to state statutes," and observed that, "it is common to see each figure in an

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[17]For example, as of March 6, 1980, twenty-two cases against nineteen different defendants were in progress in Tarrant County (Fort Worth), Texas. Brief of Appellees Curry, Evans, Hopkins, et al., at 12.

abstention decision. . . ." Briefly stated, these three considerations are: (1) the *Pullman* concern that a federal court's constitutional adjudication will be rendered nugatory by a subsequent state court decision interpreting differently the challenged state statute; (2) the concern for assuring a concrete Article III case or controversy;[18] and (3) the "Federalism" concern for avoiding interference with the construction of state law by state courts. 442 U.S. at 428-29, 99 S.Ct. at 2379-80. We follow this analysis of the abstention issue by detailed application of the first and third considerations.

A. *The* Pullman *Concern*

The two-pronged predicate for *Pullman* abstention articulated by this Court is: "(1) there must be an unsettled issue of state law; and (2) there must be a possibility that the state law determination will moot or present in a different posture the federal constitutional question raised." *Palmer v. Jackson*, 617 F.2d 424, 428 (5th Cir. 1980). That predicate is presented by the case before us.

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[18]Doubt over the existence of an Article III case or controversy does not play a role in our decision to abstain. The ordinary injury-in-fact requirement for standing is properly relaxed in the case of facial overbreadth challenges "because of the 'danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping an improper application.' " *Bigelow v. Virginia*, 421 U.S. 809, 816, 95 S.Ct. 2222, 2229, 44 L.Ed.2d 600 (1975) *quoting NAACP v. Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 338. 9 L.Ed.2d 405 (1963). Anticipatory constitutional challenges should not lightly be dismissed for lack of a justiciable controversy because, as our Circuit recently observed, they "play a most vital role in modern efforts to enforce constitutional rights." *International Society for Krishna Consciousness v. Eaves*, 601 F.2d 809, 817 (5th Cir. 1979). Thus, we do not regard the anticipatory nature of this litigation as a fact militating in favor of the abstention. These plaintiffs clearly have standing. *Cf. Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 2309, 60 L.Ed.2d 895 (1979) (plaintiffs' alleged intention to engage in conduct proscribed by certain provisions of the challenged Arizona statute presents a justiciable case or controversy with respect to those provisions)

This anticipatory challenge to the Texas obscenity statute permitted Texas courts no opportunity to interpret the Legislature's new enactment. The plaintiffs themselves complain of the statute's ambiguity. Indeed, that is one of the principal assertions underlying their claim for relief.[19] Thus, the existence of unsettled state law issues is manifest.

The second precondition for *Pullman* abstention is also met. We have endeavored, in the course of our discussion of §§ 43.21(a)(4), 43.21(a)(5), and 43.23(e) & (f) in Part II, *supra*, to point out the potential for narrowing the sweep of these statutory passages to conform to the constitutional requirements of the First and Fourteenth Amendments. Texas courts may interpret the statute in a manner that comports with constitutional guarantees of liberty. In that event, plaintiffs' claims could be moot. The state courts may, on the other hand, interpret the statute in a manner that reveals a conflict between the Legislature's intent and the federal constitutional rights of Texas' citizens. Until state courts definitively construe the statute, we are reluctant to interpose a constitutional ruling based upon our intuitive perception of unsettled Texas law issues. The *Pullman* concern presents itself strongly in this case.

If the statute warned so broadly that constitutionally privileged speech or conduct would clearly be inhibited, we would not abstain. *Kusper v. Pontikes*, 414 U.S. 51, 54-56, 94 S.Ct. 303, 306-07, 38 L.Ed.2d 260 (1973) (absten-

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[19]In addition to the overbreadth claims we have treated more fully in Part I, *supra*, plaintiffs complain that many provisions of §§ 43.21 & 43.23 are unconstitutionally vague. We find the district court's disposition of these claims correct. The language of the statute is derived, by and large, from Supreme Court decisions delineating the limits of state obscenity regulation. Even under the stringent standards traditionally applied to statutes affecting First Amendment rights, *see generally, Smith v. Goguen*, 415 U.S. 566, 573, 94 S.Ct. 1242, 1247, 39 L.Ed.2d 605 (1974), this statute affords fair notice of the conduct it proscribes. *See International Society for Krishna Consciousness v. Eaves*, 601 F.2d 809, 830-31 (5th Cir. 1979).

tion held inappropriate where challenged Illinois statute restricting participation in political primary elections was not "fairly susceptible" of a constitutional construction); *Younger v. Harris*, 401 U.S. at 53-54, 91 S.Ct. at 754-755 (gross unconstitutionality of a state action is an exceptional circumstance obviating the need for abstention); *Dombrowski v. Pfister*, 380 U.S. 479, 489-90, 85 S.Ct. 1116, 1122-23, 14 L.Ed.2d 22 (1965). But here the words are ambiguous in a relatively narrow range. We must not make it impossible to draft legislation by finding facial overbreadth and ambiguity in all words. The difficulty of defining obscenity in words has been well-considered by the courts.[20]

B. *The Federalism Concern*

Our decision is motivated, in part, by the concerns expressed in Justice Black's seminal discussion of the relationship between the states and the federal courts in *Younger:*

> "Our Federalism" . . . is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interest, always en-

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[20] *See, e.g., Miller v. California*, 413 U.S. at 22-23, 93 S.Ct. at 2613-2614 ("Apart from the initial formulation in the *Roth* case, no majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States' police power. We have seen a 'variety of views among the members of the Court unmatched in any other course of constitutional adjudication.' This is not remarkable, for in the area of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression. This is an area in which there are few eternal verities.") (per Burger, C.J.) (citations omitted); *Jacobellis v. Ohio*, 378 U.S. 184, 197, 84 S.Ct. 1676, 1683, 12 L.Ed.2d 793 (1964) ("[C]riminal laws in this area are constitutionally limited to hard-core pornography. I shall not attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it. . . .") (Stewart, J., concurring) (footnote omitted).

> deavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

401 U.S. at 44, 91 S.Ct. at 750. The Supreme Court has in recent years issued a series of opinions ordering abstention from suits bringing into focus a conflict between legitimate state regulatory interests and the federal constitutional rights of individuals. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975) (ordering abstention in suit challenging the constitutionality of Ohio nuisance statute closing theaters that show obscene films); *Juidice v. Vail*, 430 U.S. 327, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977) (ordering abstention in suit challenging state statute authorizing contempt proceedings to enforce civil judgment debts); *Trainor v. Hernandez*, 431 U.S. 434, 97 S.Ct. 1911, 52 L.Ed.2d 486 (1977) (ordering abstention in suit challenging the constitutionality of state procedures for attaching the property of welfare recipients charged with fraudulently concealing assets in their application for public assistance); *Moore v. Sims*, 442 U.S. 415, 99 S.Ct. 2371, 60 L.Ed.2d 994 (1979) (ordering abstention in suit challenging the constitutionality of Texas child protection laws).

The Texas Legislature has attempted in the challenged statute to regulate a matter of concern to the people of Texas—commercial transactions in obscene materials. The State has a legitimate interest in promulgating such regulations. *Miller v. California*, 413 U.S. at 18-19, 93 S.Ct. at 2611-2612. The product of the State's legislative processes may not be the statute we would choose as the best accommodation between the State's legitimate regulatory purposes and the federal constitutional rights of its citizens. Yet, as a federal court, we possess no mandate to engage in detailed editing of the Legislature's effort to strike the precarious balance necessary in this sensitive area. *See Miller v. California*, 413 U.S. at 25, 93 S.Ct. at 2615.

If any of the parties to this suit are among the defendnts subject to the ongoing state prosecutions, it has not been called to our attention. But while none of the plaintiffs may have "an opportunity to present their federal claims in the state proceedings," *Juidice v. Vail*, 430 U.S. at 337, 97 S.Ct. at 1218, the widespread ongoing state proceedings should create the opportunity for the state courts to resolve the constitutional challenge to the three provisions of the statute we leave subject to state court interpretation.[21] Our intervention at this stage would directly contradict the Supreme Court's guidance in *Moore v. Sims:*

> State courts are the principal expositors of state law. Almost every constitutional challenge—and particularly one as far ranging as that involved in this case—offers the opportunity for narrowing constructions that might obviate the constitutional problem and intelligently mediate federal constitutional concerns and state interests. When federal courts disrupt that process of mediation while interjecting themselves in such disputes, they prevent the informed evolution of state policy by state tribunals. The price exacted in terms of comity would only be outweighed if state courts were not competent to adjudicate federal constitutional claims—a postulate we have repeatedly and emphatically rejected.

442 U.S. 428, 99 S.Ct. at 2380 (citations omitted).

The comity principles underlying the *Younger* line of cases are brought to bear upon us with full force now that

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[21] "The breadth of the challenge to a complex state statutory scheme has traditionally militated in *favor* of abstention, not *against* it. This is evident in a number of distinct but related lines of abstention cases which, although articulated in different ways, reflect the same sensitivity to the primacy of the State in the interpretation of its own laws and the cost to our federal system of government inherent in federal court interpretation and subsequent invalidation of parts of an integrated statutory framework." *Moore v. Sims*, 442 U.S. at 428, 99 S.Ct. at 2379 (emphasis in original).

Texas has commenced criminal prosecutions to enforce its regulatory scheme. Weighing these together with the *Pullman* concerns discussed in Part IIIA, *supra*, we find abstention prudent and proper.

II. CONCLUSION

To summarize, we affirm the trial court judgments upholding the constitutionality of the Texas obscenity statute, except as to judgments upholding the facial validity of §§ 43.21(a)(4), 43.21(a)(5), 43.23(e) & 43.23(f). Rather than deciding the merits of the constitutional challenges to the facial validity of these provisions we find that the balance of factors presented in this appeal warrants our abstention. Therefore, we vacate those portions of the district court judgments involving §§ 43.21(a)(4), 43.21(a)(5) and 43.23(e) & (f) of the Texas statute and dismiss the plaintiffs' claims as to them without prejudice.

AFFIRMED IN PART; VACATED AND DISMISSED WITHOUT PREJUDICE IN PART.

APPENDIX B.

Memorandum and Opinion.

In the United States District Court for the Southern District of Texas, Houston Division.

Red Bluff Drive-In Inc., et al., Plaintiffs vs. Carol Vance, Harris County District Attorney, et al., Defendants. Civil Action No. H-79-1747 (Consolidated with H-79-1773 and H-79-1794).

Filed September 26, 1979.

In this action for declaratory and injunctive relief, Plaintiffs challenge as unconstitutional practically every provision of Texas Penal Code (hereinafter referred to as "the Statute") Sections 43.21 and 43.23 recently enacted as H.B. 1741.[1]

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[1]SECTION 1. Section 43.21, Penal Code, is amended to read as follows:

Sec. 43.21. DEFINITIONS. (a) In this subchapter:

(1) *"Obscene" means material or a performance that:*

(A) *the average person, applying contemporary community standards, would find that taken as a whole appeals to the prurient interest in sex;*

(B) *depicts or describes:*

(i) *patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or stimulated, including sexual intercourse, sodomy, and sexual bestiality; or*

(ii) *patently offensive representations or descriptions or masturbation, excretory functions, sadism, masochism, lewd exhibition of the genitals, the male or female of arousal, covered male genitals in a discernibly turgid state or a device designed and marketed as useful primarily for stimulation of the human genital organs; and*

(C) *taken as a whole, lacks serious literary, artistic, political, and scientific value.*

(2) *"Material" means anything tangible that is capable of being used or adapted to arouse interest, whether through the medium of reading, observation, sound, or in any other manner, but does not include an actual three dimensional obscene device.*

(3) *"Performance" means a play, motion picture, dance, or other exhibition performed before an audience.*

(4) *"Patently offensive" means so offensive on its face as to affront current community standards of decency.*

(5) *"Promote" means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same.*

(footnote continued on following page)

PARTIES

Plaintiffs are primarily operators of adult book stores.

Defendants are primarily officials responsible for the enforcement of the statute.

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(6) *"Wholesale promote" means to manufacture, issue, sell, provide, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, or to offer or agree to do the same for purpose of resale.*

(7) *"Obscene device" means a device including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs.*

(b) If any of the depictions or descriptions of sexual conduct described in this section are declared by a court of competent jurisdiction to be unlawful included herein, this declaration shall not invalidate this section as to other patently offensive sexual conduct included herein.

SECTION 2. Section 43.23, Penal Code, is amended to read as follows:

Sec. 43.23. OBSCENITY. (a) A person commits an offense if, knowing its content and character, he wholesale promotes or possesses with intent to wholesale promote any obscene material or obscene device.

(b) Any offense under Subsection (a) of this section is a felony of the third degree.

(c) A person commits an offense if, knowing its content and character, he:

(1) promotes or possesses with intent to promote any obscene material or obscene device; or

(2) produces, presents, or directs an obscene performance or participates in a portion thereof that is obscene or that contributes to its obscenity.

(d) An offense under Subsection (c) of this section is a Class A misdemeanor.

(e) *A person who promotes or wholesale promotes obscene material or an obscene device or possesses the same with intent to promote or wholesale promote it in the course of his business is presumed to do so with knowledge of its content and character.*

(f) *A person who possesses six or more obscene devices or identical or similar obscene articles is presumed to possess them with intent to promote the same.*

(g) This section does not apply to a person who possesses or distributes obscene material or obscene devices or participates in conduct otherwise prescribed by this section when the possession, participation, or conduct occurs in the course of law enforcement activities.

SECTION 3. If any portion of this Act is declared unlawful by a court of competent jurisdiction, this declaration does not invalidate any other portions of this Act.

SECTION 4. This Act applies only to offenses committed on or after its effective date. A criminal action for an offense committed before

(footnote continued on following page)

JURISDICTION

The jurisdiction of the Court is generally invoked pursuant to 28 U.S.C.A. § 1343(3) and (4) and 28 U.S.C.A. § 1331(a).

ABSTENTION

No state criminal proceeding was pending at the time this complaint was filed. Accordingly, abstention is inappropriate under the facts presented. *See Steffel v. Thompson*, 415 U.S. 452 (1974).

VENUE

Venue is appropriate under 28 U.S.C.A. § 1392(a) since the statute has statewide application. *Gilmore v. James*, 274 F.Supp. 75, 89 n.10 (S.D. Tex. 1967), *judgment affirmed*, 389 U.S. 572 (1968); *Hyden v. Baker*, 286 F.Supp. 475, 481 (M.D. Tenn. 1968). Additionally, the facts of this case do not warrant a change of venue pursuant to 28 U.S.C.A. § 1404(a). *See Time, Inc. v. Manning*, 366 F.2d 690, 698 (5th Cir. 1966); *Nowell v. Dick*, 413 F.2d 1204, 1212 (5th Cir. 1969).

INJUNCTIVE RELIEF

On August 31, 1979, a hearing was held and Defendants were temporarily enjoined from enforcing the Statute until September 10, 1979, when a hearing on Plaintiffs' motion for a permanent injunction took place. Defendants were given a period of time to answer and submit briefs.

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this Act's effective date is governed by the law in existence before the effective date of this Act, and Sections 43.21 and 43.23, Penal Code, as in existence before the effective date of this Act, are continued in effect for this purpose as if this Act were not in effect. For the purpose of this section, an offense is committed before the effective date of this Act if any element of the offense is committed before the effective date.

SECTION 5. This Act takes effect September 1, 1979.

SECTION 6. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended. (emphasis added)

CONSTITUTIONALITY

The Supreme Court has directed that a state statute should not be deemed invalid unless its deterrent effect on legitimate expression is both real and substantial. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975); *Ward v. Illinois*, 431 U.S. 767, 776 (1977).

Plaintiffs' attack on the use of certain terms in the statute echo those made in *Roth v. United States*, 354 U.S. 476 (1957), regarding the federal statute which spoke of "'material" which was 'obscene, lewd, lascivious, or filthy . . . or other publication of an indecent character.' The court responded then as it has since, that:

> Many decisions have recognized that these terms or obscenity statutes are not precise. This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. '. . . [T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . .' These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark '. . . boundaries sufficiently distinct for judges and juries fairly to administer the law . . . That there may be marginal cases in which side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. . . .'

Id. at 491-492 (footnote and citation omitted). *Also see Intern. Soc. for Krishna Consciousness v. Eaves*, No. 77-1284, slip op. at 7260 (5th Cir. Aug. 30, 1979) (Quoting Judge Goldberg, 'Condemned to the use of words', however, 'we can never expect mathematical certainty from our language.').

Furthermore, the obscenity statute is subject to construction under Texas Penal Code § 1.05, entitled *Construction of Code* wherein it states:

> (a) The rule that a penal statute is to be strictly construed does not apply to this code. The provisions of this code shall be construed according to the fair import of their terms, to promote justice and effect the objectives of the code.
>
> (b) Unless a different construction is required by the context, § 2.01,[2] 2.02, 2.04, 2.05, and 3.01 through 3.12 of the Code Construction Act (Article 5429b-2, Vernon's Texas Civil Statutes) apply to the construction of this code.

(footnote added).

Plaintiffs' claims of imprecision in terminology and resulting allegations of overbreadth and vagueness must be viewed in light of the above construction aids and the constitutional dictates of caution articulated in *Erznoznik v. City of Jacksonville, supra, Roth v. United States, supra,* and *Ward v. Illinois, supra.*

1. *Section 43.21(a)(1)(A)* recites verbatim the language used in *Miller v. California,* 413 U.S. 15, 24 (1973) (hereinafter referred to as *Miller*) except that the language "*material* or *performance*" is substituted for the word "work." There is no significance in this mere interchange of words whose meanings are clearly defined in the Statute at section 43.21(a)(2) and (3).

2. *Section 43.21(a)(1)(B)(i)* also recites verbatim the language used in *Miller*, except the phrase "*including sexual*

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[2]*The Code Construction Act, Article 5429b-2, Sec. 2.01, provides: "That words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by limiting definition or otherwise, shall be construed accordingly."*

intercourse, sodomy, and sexual bestiality." It is clear that this phrase is a reference to the type of sexual acts which, if found to be patently offensive in their presentation, would be covered under the Statute. This terminology seems to be taken from the suggestions found in *Miller*: "As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law as written or authoritatively construed." *Id.* at 24. (footnote omitted). The phrase quoted is a description of the "hard core" sexual conduct that may be punished as being obscene. *Miller* at 27. "If the human subject of the depiction or description is engaged in sexual action, whether by himself or herself, or with another, then the material is 'hard core' sexual conduct, as the Supreme Court used the term, and it may be banned." *Sovereign News Co. v. Falke*, 448 F.Supp. 306, 397 (N.D. Ohio 1977).

The language of the Supreme Court in *Ward v. Illinois, supra* at 776, also provides guidance: "Since it is plain enough from its *prior cases* and from its response to *Miller* that the Illinois Court recognizes the *limitations* on the *kinds* of sexual conduct which may not be represented or depicted under the obscenity laws, we cannot hold the Illinois statute to be unconstitutionally overbroad." (emphasis added).

The Supreme Court imposed a *Miller* construction, thereby limiting potential prosecution to instances of "hard core" depictions or descriptions of sexual conduct. The Texas Courts have also *limited* the application of the former Texas obscenity statute to the hard core sexual conduct as the Court used the term in *Miller*. *See Hunt v. State*, 475 S.W.2d 935, 936-937 (Tex. Crim. App. 1972); *Thacker v. State*, 490 S.W.2d 854, 855 (Tex. Crim. App. 1973); *Evert v. State*, 561 S.W.2d 489, 490-491 (Tex. Crim. App. 1978). *Also see Sovereign News v. Falke, supra* at 397.

3. *Section 43.21(a)(1)(B)(ii)* also recites to a certain extent the *Miller* language except the following *"patently offensive representations or descriptions"*:

A. *Sadism, masochism* — Sado-masochistic materials are the kind of materials that may be proscribed by state law even though they were not expressly included within the examples that *Miller* gave to explicate the aspect of its obscenity definition dealing with patently offensive depictions of defined sexual conduct. *Ward v. Illinois, supra* at 773.

In further support of the quoted phrase above, the Supreme Court in *Miller* at 24 n.6, specifically approved the Oregon[3] in (1971) and Hawaii[4] (1972) obscenity statutes

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[3] OREGON LAWS, 1971

Article 29. Obscenity and Related Offenses

SECTION 255. Definitions. As used in sections 255 to 262 of this Act, unless the context requires otherwise:

(1) "Advertising purposes" means purposes of propagandizing in connection with the commercial sale of a product or type of product, the commercial offering of a service, or the commercial exhibition of an entertainment.

(2) "Displays publicly" means the exposing, placing, posting, exhibiting, or in any fashion displaying in any location, whether public or private, an item in such a manner that it may be readily seen and its content or character distinguished by normal unaided vision viewing it from a public thoroughfare, depot or vehicle.

(3) "Furnishes" means to sell, give, rent, loan or otherwise provide.

(4) "Minor" means an unmarried person under 18 years of age.

(5) "Nudity" means uncovered, or less than opaquely covered, post-pubertal human genitals, public areas, the post-pubertal human female breast below a point immediately above the top of the areola, or the *covered human male genitals in a discernibly turgid state*. For the purposes of this definition, a female breast is considered uncovered if the nipple only or the nipple and the areola only are covered.

(6) "Obscene performance" means a play, motion picture, dance, show or other presentation, whether pictured, animated or live, performed before an audience and which in whole or in part depicts or reveals nudity, sexual conduct, sexual excitement or sado-masochistic abuse, or which includes obscenities or explicit verbal descriptions or narrative accounts of sexual conduct.

(7) "Obscenities" means those slang words currently generally rejected for regular use in mixed socity, that are used to refer to genitals,

(footnote continued on following page)

with regard to their specific definitions of proscribed physical conduct. Both statutes make clear reference to sadomasochism within their definitional provisions. *See* Or.Rev.Stat. § 255(9) and Hawaii Penal Code § 712-1210(9).

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female breasts, sexual conduct or excretory functions or products, either that have no other meaning or that in context are clearly used for their bodily, sexual or excretory meaning.

(8) "Public thoroughfare, depot or vehicle" means any street, highway, park, depot or transportation platform, or other place, whether indoors or out, or any vehicle for public transportation owned or operated by government, either directly or through a public corporation or authority, or owned or operated by any agency of public transportation that is designed for the use, enjoyment or transportation of the general public.

(9) "*Sado-masochistic abuse" means flagellation or torture by or upon a person who is nude or clad in undergarments or in revealing or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.*

(10) "Sexual conduct" means human masturbation, sexual intercourse or any touching of the genitals, pubic areas or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification.

(11) "Sexual excitement" means the condition of *human male or female genitals* or the breasts of the female when *in a state of sexual stimulation*, or the sensual experiences of humans engaging in or witnessing sexual conduct or nudity.

HAWAII PENAL CODE

Part II. Offenses Related to Obscenity

§ 712-1210 Definitions of terms in this part. In this part, unless a different meaning is required:

(1) "Disseminate" means to manufacture, issue, publish, sell, lend, distribute, transmit, exhibit, or present material or to offer or agree to do the same.

(2) "Material" means any printed matter, visual representation, or sound recording, and includes but is not limited to books, magazines, motion picture films, pamphlets, newspapers, pictures, photographs, drawings, sculptures, and tape or wire recordings.

(3) "Minor" means any person less than sixteen years old.

(4) "Performance" means any play, motion picture film, dance, or other exhibition performed before an audience.

(5) "Pornographic." Any material or performance is "pornographic" if all of the following coalesce:

(a) Considered as a whole, its predominant appeal is to prurient interest in sexual matters. In determining predominant ap-

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ical conduct. Both statutes make clear reference to sadomasochism within their definitional provisions. *See* Or.Rev.Stat. § 255(9) and Hawaii Penal Code § 712-1210(9).

B. *The male or female genitals in a state of sexual stimulation or arousal, covered male genitals in a discernibly turgid state* — the *Miller* decision requires that a statute

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peal, the material or performance shall be judged with reference to ordinary adults, unless it appears from the character of the material or performance and the circumstances of its dissemination that it is designed for a particular, clearly defined audience. In that case, it shall be judged with reference to the specific audience for which it was designed.

(b) It goes substantially beyond customary limits of candor in describing or representing sexual matters. In determining whether material or a performance goes substantially beyond the customary limits of candor in describing or representing sexual matters, it shall be judged with reference to the contemporary standards of candor of ordinary adults relating to the description or representation of such matters.

(c) It is utterly without redeeming social value.

(6) "Pornographic for minors." Any material or performance is "pornographic for minors" if:

(a) It is primarily devoted to explicit and detailed narrative accounts of sexual excitement, sexual conduct, or sadomasochistic abuse; and:

(i) It is presented in such a manner as to predominantly appeal to a minor's prurient interest; and

(ii) It is utterly without redeeming social value for minors; or

(b) It contains any photograph, drawing, or similar visual representation of any person of the age of puberty or older revealing such person with less than a fully opaque covering of his or her genitals and pubic area, or depicting such person in a state of sexual excitement or engaged in acts of sexual conduct or sadomasochistic abuse; and:

(i) It is presented in such a manner as to predominately appeal to a minor's prurient interest; and

(ii) It is utterly without redeeming social value for minors.

(7) "Sexual conduct" means acts of masturbation, homosexuality, lesbianism, bestiality, sexual intercourse or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or the breast or breasts of a female for the purpose of sexual stimulation, gratification, or perversion.

(8) "Sexual excitement" means *the condition of the human male or female genitals when in a state of sexual stimulation or arousal.*

(9) *"Sadomasochistic abuse" means flagellation or torture by or upon a person as an act of sexual stimulation or gratification.*

restricting the depiction or description of sexual conduct define specifically the nature of the depictions or descriptions that are barred. *Id.* at 24. The above phrase appears to satisfy the *Miller* requirements of specificity since the Supreme Court has apparently approved of the language "lewd exhibition of the genitals *especially in a stimulated condition.*" *McKinney v. Parsons*, 513 F.2d 264, 268 (5th Cir. 1975), citing *Amato v. Divine*, 496 F.2d 441 (7th Cir.), *vacated*, 419 U.S. 1014 (1974) (emphasis added).

Upon examination of the Oregon statute referred to by the Supreme Court, *supra*, one finds the language "covered human male genitals in a discernibly turgid state," Or.Rev.Stat. § 255(5), and "human male or female genitals . . . in a state of sexual stimulation." Or.Rev.Stat. § 255 (11). Likewise, the Hawaii statutory language includes "the condition of the human male or female genitals when in a state of sexual stimulation or arousal." Hawaii Penal Code § 712-1210(8).

C. *A device designed and marketed as useful primarily for stimulation of the human genital organs.* The Statute's prohibition against obscene devices is two-fold. The "obscene device" mentioned in 43.21(a)(7) is constitutional in light of *Sewell v. Georgia*, 238 Ga. 495, 233 S.E.2d 187 (1977), *appeal dismissed for want of a sustantial federal question*, 98 S.Ct. 1635 (1978). (*See discussion infra.*) Patently offensive representations of this device surely comply with the "hard core" sexual action restricted in *Miller*. This type of sexual action can also be seen as similar to masturbation as discussed in *Miller* at 25 and referred to in the Statute at Section 43.21(a)(1)(B)(ii). *Also see Sovereign News Co. v. Falke, supra* at 397.

4. *Section 43.21(a)(1)(C)* also recites verbatim the language in *Miller* except Texas uses "and" instead of "or." The use of the "and" language makes it more difficult to convict under the Code and imposes no greater burden on

free speech; hence, the modification is constitutional. *See Mishkin v. New York*, 383 U.S. 502, 507 (1966); *Erznoznik v. City of Jacksonville, supra* at 208.

5. *Section 43.21(a)(3)* — Plaintiff makes an issue of the definition of "performance," stating that it overbroad, since it possibly applies to activities in the home involving the spouses in violation of *Stanley v. Georgia*, 394 U.S. 557 (1969). The definition specifically mentions "performed before an *audience*." (emphasis added). According to Ballentine's Law Dictionary, Third Edition, the definition of "audience" is "*a body of people* assembled to hear." (emphasis added). *Stanley v. Georgia, supra*, deals specifically with *mere private* possession of obscene *materials*, *id.* at 559, 561, 567, 568, when someone is "alone" in his own home, *id.* at 565, and not with the area of public dissemination. *Id.* at 561. Accordingly, Plaintiffs' argument is without merit.

6. *Sections 43.21(a)(2), (4), (5) and (6)* are constitutional as they more *specifically* define what is obscene and what constitutes an offense. *See generally Miller* at 24.

7. *Section 43.21(a)(7)* — *Obscene devices* as referred to in this section are three dimensional objects which are obscene *per se* without the need to look at *Miller*. This provision has been held constitutional in *Sewell v. Georgia*, 238 Ga. 495, 233 S.E.2d 187 (1977), *appeal dismissed for want of a substantial federal question*, 98 S.Ct. 1635 (1978). This case involved a conviction for possession of an artificial vagina. The statute in Georgia, Ga. Code Ann. § 26-2101(c), states in pertinent part that, "any device designed or marketed as useful primarily for the stimulation of human genital organs is obscene material." The Georgia Supreme Court held that the artificial vagina, under the statute, was obscene as a matter of law and that the statute was not unconstitutional for vagueness and overbreadth. *Id.* at 189. This Texas statute concerns an identical provision.

Sewell v. Georgia, supra, was dismissed by the Supreme Court for want of a substantial federal question. The Supreme Court has addressed the problem of the precedential weight to be accorded a dismissal by the Court of an appeal from a state court decision "for want of a substantial federal question." *Hicks v. Miranda,* 422 U.S. 332 (1975). The Court held that a dismissal of an appeal for want of a substantial federal question was a decision on the merits, entitled to precedential weight. *Id.* at 344-345. As the Supreme Court recently explained:

> Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions. . . . The precedential significance of the summary action in [a case], however, is to be assessed in light of all the facts in that case. . . .

Mandel v. Bradley, 432 U.S. 173, 176 (1977); *Pollard v. Cockrell,* 578 F.2d 1002, 1010 (5th Cir. 1978).

Accordingly, the Court finds this Section to be constitutional.

8. *Sections 43.23(e) and (f)* — As a source of authority for these provisions Defendants cite *Overstock Book Co. v. Barry,* 436 F.2d 1289 (2nd Cir. 1970). In *Overstock,* the Court stated:

> Use of such inferences is permissible in criminal cases at least when it can be said beyond a reasonable doubt, and perhaps when it is more likely than not, that the presumed fact flows from the provided fact. *Turner v. United States,* 396 U.S. 398, 416 (1970). Judged by

> either standard, the presumptions of § 235.10(1), (2),[5] [similar to Texas Penal Code language] are more like those approved in *Turner v. United States, supra,* and *United States v. Gainey,* 380 U.S. 63 (1965), than those disapproved in *Tot v. United States,* 319 U.S. 463 (1943), *United States v. Romano,* 382 U.S. 136 (1965), and *Leary v. United States, supra.*

Id. at 1294. (footnote added and parallel citations omitted)

In *People v. Kirkpatrick,* 32 N.Y.2d 17, 295 N.E.2d 753 (1973), the New York Court of Appeals upheld § 235.10(1) [T.P.C. § 42.23(e)] against the identical constitutional attack presented in the case at bar. The United States Supreme Court dismissed the criminal defendant's appeal and constitutional challenge for want of a substantial federal question. *Kirkpatrick v. New York,* 414 U.S 948 (1973). Such a dismissal is a disposition on the merits and entitled to precedential weight. *See Hicks v. Miranda, supra; Mandel v. Bradley, supra* at 176; *Pollard v. Cockrell, supra* at 1010.

With respect to the issue of presumptions, Title 18, U.S.C.A. § 1465, entitled, *Transportation of obscene matters for sale or distribution,* states as follows:

> Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, case, phonograph recording, electrical transcription or other article capable

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[5] *NEW YORK PENAL LAW*

§ 235.10 *Obscenity; presumptions*

1. *A person who promotes obscene material, or possesses the same with intent to promote it, in the course of his business is presumed to do so with knowledge of its content and character.*

2. *A person who possesses six or more identical or similar obscene articles is presumed to possess them with intent to promote the same. (Note: Subdivision 1, as amended September 1, 1969 also includes wholesale promotes.).*

> of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both.
>
> The transportation as aforesaid of two or more copies of any publication or two or more of any article of the character described above, or a combined total of five such publications and articles, shall created a *presumption* that such publications or articles are intended for sale or distribution, but such presumption shall be rebuttable. (emphasis added).

This statute has been held to be constitutional as not being vague or overbroad. *United States v. Hill*, 500 F.2d 733, 739 (5th Cir. 1974), *cert. denied*, 420 U.S. 952 (1975).

Citing *Smith v. California*, 316 U.S. 147 (1959), Plaintiffs additionally argue that the ability of the State to enact a statute punishing an act in a presumptive manner without requiring proof of a specific criminal intent is an impermissible prior restraint. *Smith v. California, supra*, was a case dealing with absolute criminal liability. The Court ruled that although certain exceptions exist especially in the area of food and drug legislation, *id.* at 152; *U.S. v. Mullens*, 583 F.2d 134, 138 (5th Cir. 1978), some mental element is requisite to a constitutional permissible prosecution when a case deals with the area of obscenity and First Amendment rights. *Id.* at 154.

The Court found little merit in the argument that regulation would be ineffective unless the scienter requirement is dispensed with. It stated that "eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the *inference* [or presumption] that he was aware of what a book contained, despite his denial." *Id.* at 154.

With regard to Plaintiffs' allegations concerning the interpretation to be accorded presumptions, the Texas Penal Code, § 2.05 states:

> When this code or another penal law establishes a *presumption* with respect to any fact, it has the following consequences:
>
> (1) if there is sufficient evidence of the facts that give rise to the presumption, the issue of the existence of the presumed fact must be submitted to the jury, unless the court is satisfied that the evidence as a whole clearly precludes a finding beyond a reasonable doubt of the presumed fact; and
>
> (2) if the existence of the presumed fact is submitted to the jury, the court shall charge the jury, in terms of the presumption and the specific element to which it applies, as follows:
>
> (A) that the facts giving rise to the presumption must be proven beyond a reasonable doubt;
>
> (B) that if such facts are proven beyond a reasonable doubt the jury *may* find that the element of the offense sought to be presumed exists, *but it is not bound to so find*;
>
> (C) that even though the jury may find the existence of such element, the state must prove beyond a reasonable doubt each of the other elements of the offense charged; and
>
> (D) if the jury has a reasonable doubt as to the existence of a fact or facts giving rise to the presumption, the presumption fails and the jury shall not consider the presumption for any purpose.

(emphasis added).

This provision has been interpreted by the Texas courts as not conflicting with the presumption of innocence and not shifting the burden of proof to be accused. *See Easdon v. State*, 552 S.W.2d 153, 155 (Tex. Crim. App. 1977); *Slagle v. State*, 570 S.W.2d 916 (Tex. Crim. App. 1978);

Ruiz v. State, 523 S.W.2d 691, 694-695 (Tex. Crim. App. 1975). *Also see A Proposal for a Presumption of Unlawful Possession in Texas Criminal Cases*, 29 Baylor Law Review, 499, 505-509 (1977); *Presumptions in Criminal Cases*, 20 Baylor Law Review 277 (1968).

Finally, Plaintiffs assert the case of *Stanley v. Georgia, supra*, as authority for the proposition that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime. However, we are dealing with a different type situation in this Statute. Mere possession is not a crime; it is merely a *presumption* of intent to promote a crime. In *United States v. Knight*, 395 F.2d 971 (2nd Cir. 1968), *cert. denied*, 395 U.S. 930 (1969), appellant was arrested in his home and convicted for interstate transportation of obscene materials for the purpose of sale and distribution pursuant to 18 U.S.C.A. § 1465, *supra*. The Judge rejected the defense contention that the *presumption of intent to distribute* had been *rebutted* by appellant's wife. *Id.* at 973. *See also United States v. Nocerino*, 474 F.2d 993, 995 n.1 (2nd Cir.), *cert. denied*, 412 U.S. 942 (1973).

Any arrest and conviction under the Texas Penal Code would involve the same situation as *United States v. Knight, supra*. A jury would not be bound to find that any defendant intends to promote an obscene item by mere possession in the home.

CONCLUSION

For the foregoing reasons the Court finds that Texas Penal Code Sections 43.21 and 43.23 comport with the requirements of the Constitution of the United States as interpreted by the Supreme Court.

Accordingly, it is Ordered that the preliminary injunction be and it is hereby dissolved and the request for permanent injunction DENIED.

Done at Houston, Texas, this 26th day of September, 1979.

/s/ Norman W. Black
NORMAN W. BLACK
UNITED STATES DISTRICT JUDGE

APPENDIX C.

Judgment of the Court of Appeals for the Fifth Circuit.

United States Court of Appeals, for the Fifth Circuit.

Red Bluff Drive-In, Inc., Etc., ET AL., Plaintiffs-Appellants, versus, Carol Vance, Harris County District Attorney, ET AL., Defendants-Appellees. No. 79-3182. D. C. Docket Nos. CA-H-79-1747, CA-H-79-1773 & CA-H-79-1794.

Appeals from the United States District Court for the Southern District of Texas.

Filed September 9, 1981.

Before AINSWORTH, CHARLES CLARK and WILLIAMS, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part; and vacated and dismissed, without prejudice, in part;

It is further ordered that the plaintiffs-appellants pay to the defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

June 23, 1981

Issued As Mandate: September 3, 1981

APPENDIX D.

On Petition for Rehearing and Suggestions for Rehearing En Banc.

In the United States Court of Appeals, for the Fifth Circuit, Unit A.

Red Bluff Drive-In, Inc., etc., et al., Plaintiffs-Appellants, versus Carol Vance, Harris County District Attorney, et al., Defendants-Appellees. No. 79-3182.

Appeals from the United States District Court for the Southern District of Texas.

(Opinion June 23, 1981, 5 Cir., 198__, ____ F.2d ____). (August 24, 1981).

Filed August 24, 1981.

Before AINSWORTH, CHARLES CLARK and WILLIAMS, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ J. S. Williams
United States Circuit Judge

Clerk's Note:
See Rule 41 FRAP and Local Rule 17 for Stay of the Mandate.

APPENDIX E.

Constitutional and Statutory Provisions Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . . ."

2. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . . ."

3. The pertinent provisions of Title 28 U.S.C. § 1651 are:

> "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

4. The pertinent provisions of Rule 8 of the Federal Rules of Appellate Procedure are:

> Rule 8. Stay or Injunction Pending Appeal
>
> (a) Stay Must Ordinarily Be Sought in the First Instance in District Court; Motion for Stay in Court of Appeals. Application for a stay of judgment or order of a district court pending appeal, or for approval of a supersedeas bond, or for an order suspending, modifying, restoring or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the district court. A motion for such relief may be made to the court of appeals or to a judge thereof, but the motion shall show that application to the district court for the relief sought is not practicable, or that the district court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the district court for its action. The motion shall also show the reasons

for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant. Reasonable notice of the motion shall be given to all parties. The motion shall be filed with the clerk and normally will be considered by a panel or division of the court, but in exceptional cases where such procedure would be impracticable due to the requirements of time, the application may be made to and considered by a single judge of the court.

5. Texas Penal Code §§ 43.21 and 43.23 appear verbatim in footnote 1 of the opinion of the court of appeals set forth herein in full in Appendix "A". The footnote appears at p. A-1, *supra*.

Opposition

Office-Supreme Court, U.S.
FILED
DEC 22 1981
ALEXANDER L. STEVAS,
CLERK

NO. 81-974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THEATRES WEST, INC., dba WESTWORLD CINEMA, THEATRE DEAUVILLE AND CINEMA WEST, et al.,
Petitioners,

v.

JOHN HOLMES, HARRIS COUNTY DISTRICT ATTORNEY, et al.,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, Unit A.

RESPONDENT'S BRIEF IN OPPOSITION

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NO. 81-974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THEATRES WEST, INC., dba WESTWORLD CINEMA, THEATRE DEAUVILLE AND CINEMA WEST, et al.,
Petitioners,

v.

JOHN HOLMES, HARRIS COUNTY DISTRICT ATTORNEY, et al.,
Respondents

RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

The Respondent, John B. Holmes, Jr., District Attorney for Harris County, Texas, respectfully requests that this Court deny the Petition for Writ of Certiorari invoked pursuant to 28 U.S.C. § 1254(1), seeking review of the Fifth Circuit's opinion in this case.

REASONS WHY WRIT SHOULD BE DENIED

Petitioners advance two reasons why they believe the Writ of Certiorari should be granted in the cause *sub*

judice. They do not assert a conflict between the decision below and that rendered by this Court or any other federal or state tribunal. Rather they essentially request this Court to review findings of the lower courts.

I.

THE DECISION OF THE COURT OF APPEALS TO ABSTAIN SUA SPONTE IN A CASE INVOLVING A FACIAL CHALLENGE OF FIRST AMENDMENT OVERBREADTH GROUNDS TO A CRIMINAL STATUTE WAS PROPER IN VIEW OF INTERVENING CIRCUMSTANCES, AND THE UPHOLDING OF THE CONSTITUTIONALITY OF MOST OF THE STATUTE BY THE COURT OF APPEALS.

A. Younger-Pullman "Abstention Calculus" Was Appropriate.

Petitioners sought declaratory and injunctive relief from enforcement of §§ 43.21, 43.23, Vernon's Texas Annotated Penal Code (V.A.P.C.), contending that several provisions of the challenged legislation were facially overbroad in several critical areas. The trial courts found that §§ 43.21, 43.23, *supra*, comported with the requirements of the Constitution of the United States as interpreted by the Supreme Court. The court of appeals, thereafter, affirmed the trial court judgments except as to judgments upholding the facial validity of §§ 43.21 (a)(4), 43.21(a)(5), 43.23(e), and 43.23(f) *supra*. Rather than deciding the merits of constitutional challenges to those provisions, the court of appeals found that the balance of factors in the appeal warranted abstention.

§ 43.21(a)(4), *supra*, defines "patently offensive" in terms of "community standards of decency"; § 43.21(a)(5), *supra*, defines "promote" in terms of nineteen different verbs, *inter alia*, manufacture, sell, deliver, distribute, disseminate. § 43.23(e), *supra*, provides that one who possesses obscene material or devices with intent to promote in the course of his business is presumed to have knowledge of their content and character. § 43.23(f), *supra*, provides that one who possesses six or more obscene articles is presumed to possess them with intent to promote them.

The court of appeals observed that following the denial of relief to Petitioners in the trial court, and the denial of stay pending appeal, numerous criminal prosecutions against the challenged statute had been initiated. Application of the comity principles underlying the *Younger v. Harris*, 401 U.S. 37 (1971) line of decisions together with those set forth in *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941) and its progeny, therefore motivated abstention.

Petitioners correctly assert that abstention has generally been the exception in this Court, rather than the rule. *See for example, Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *Brockett v. Spokane Arcades, Inc.*, ___U.S.___, 50 U.S.L.W. 3373 (November 9, 1981). Chief Justice Burger dissenting in favor of abstention in *Brockett*, however, argued that

> "The policies of federalism and comity militate in favor of affording state judges—who are as capable as are federal judges of enforcing the Constitution of

> the United States . . . the initial opportunity to consider the scope and validity of state statutes. This is particularly so when the state law under consideration has never been applied, and when its interpretation is uncertain; in such a case the state court's construction of the statute may obviate the need for adjudication of the federal constitutional issues, or the state court may resolve those issues as we would." ____U.S.____, 50 U.S.L.W. 3373.

Chief Justice Burger's analysis rings loud when applied to the instant case. Petitioners' anticipatory challenge to the Texas obscenity statute afforded the Texas courts no opportunity to interpret the challenged provisions. Petitioners, by complaining of the statute's ambiguity, clearly acknowledged the existence of unsettled state law issues. Contrary to Petitioners' contentions, and recognized by the court of appeals, the Texas courts could interpret those four provisions of the statute found questionable in a manner comporting with constitutional guarantees of liberty.

For example, as the court of appeals noted, "patently offensive" could be limited by properly formulated jury instructions to be in terms of "community standards of tolerance" as opposed to "community standards of decency". Necessary exceptions narrowing the scope of "promote" could be found in the area of marital or medical areas. Likewise the Texas courts, in the formulation of jury instructions, and guided by Tex. Penal Code § 2.05, which prescribes the rules for the operation of Penal Code presumptions, could obviate any potential conflict between the application of the presumptions under § 43.23(e)(f), *supra*, and due process and First Amendment requirements.

The court of appeals' decision to affirm the constitutionality of most of the Texas obscenity statute, while abstaining from a resolution of the four provisions now in question, is analogous to the result reached by this Court in *Bobbitt v. United Farm Workers Union*, 442 U.S. 289 (1979). Moreover, because Texas courts will not consider declaratory relief if a claim is remanded to the continuing jurisdiction of the district court, dismissal without prejudice was appropriate herein. *See, Harris County Commissioners' Court v. Moore*, 420 U.S. 77 (1975).

Since the majority of the statute remained "intact" following court of appeals' scrutiny, and those provisions in question do not warn so broadly that constitutionally privileged speech or conduct is inhibited, abstention is appropriate in respect of federalism. It is patent that Texas has a legitimate interest in promulgating regulations regarding commercial transactions in obscene material. *Miller v. California*, 413 U.S. 415 (1973). This Court, in approving the court of appeals' decision to abstain, may find guidance in its decisions in *Moore v. Sims*, 442 U.S. 415 (1979), and *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975).

Petitioners' assertions that there is neither an adequate nor available state forum in which to obtain an authoritative state court construction is erroneous. Petitioners initially could have sought declaratory relief in the civil district courts, or if arrested for violation of the challenged statute, could have been prosecuted. In any event, Petitioners' appeal in either the civil or criminal case would lie to the Texas Court of Appeals which has concurrent jurisdiction over both civil and criminal appeals.

Article 5, § 6, Texas Constitution (effective September 1, 1981). Consequently, an authoritative construction of the challenged legislation could be obtained in the state courts. In construing prior obscenity legislation, for example, the Texas courts have accepted such an invitation and construed the law so as to bring it within the mandates of *Miller. See, West v. State,* 514 S.W.2d 433 (Tex. Crim. App. 1974).

In summary, the background of the instant appeal is atypical. Much of the statute has been found to pass constitutional muster by the court of appeals. Because the district courts found the statute constitutional, and no stay was issued by the court of appeals, prosecution under the statute has been vigorous and widespread throughout Texas. The court of appeals noted that as of March 6, 1980, twenty-two cases against nineteen different defendants were in progress in Tarrant County. As of the time of the filing of this Response, approximately *five hundred* prosecutions had been commenced in Harris County, Texas, under the challenged statute. A high percentage of these prosecutions have resulted in convictions. Approximately thirty-five of those prosecutions resulting in convictions are on appeal from Harris County, Texas, to the Texas appellate courts.

The extent of prosecutions under the challenged statute, many instances of which involve Petitioners herein, coupled with the validation of much of the statute by the court of appeals and that court's suggestions as to means whereby the four questionable provisions could be narrowed, clearly suggest that a Younger-Pullman "abstention calculus" was appropriate.

B. The Challenged Statute Is Constitutional.

Notwithstanding the court of appeals' decision to abstain as to Petitioners' challenge to the facial validity of the four provisions found to be questionable, Respondent submits that the entire statute is constitutional and not subject to facially overbroad or vagueness attack. Since the court of appeals only expressed concern with §§ 43.21 (a)(4)(5), 43.23(e)(f), however, the remainder of the statute will not be discussed, and Respondent will rely upon the court of appeals' examination and approval of those remaining provisions.

The definition of "patently offensive" in § 43.21(a)(4), is neither vague nor overbroad. The Texas definition of "patently offensive" is the same definition approved by this Court in *Manual Enterprises v. Day*, 370 U.S. 478 (1962). As observed by Respondents in the court of appeals, when this Court wrote in *Miller* of "contemporary community standards", it logically followed that it was written with reference to the "standards of decency" discussed in *Manual Enterprises*. Further, the issue of "tolerance" becomes a matter of evidence presented in the form of "comparables".

Likewise the definition of "promote" in § 43.21(a)(5), is neither vague nor overbroad. This provision more than *specifically* defines what constitutes an offense under the statute. *See, generally, Miller v. California*, 413 U.S. 15, 24 (1973). Moreover, since Petitioners herein are all commercial purveyors of adult sexually oriented material, they do not possess standing to challenge the alleged overbreadth of "promote" when at best, as the court of appeals noted, only marital or medical exceptions could be swept within the ambit of acts sought to be criminalized.

The presumptions concerning knowledge and intent [§ 43.23(e)(f)] do not deprive Petitioners of any constitutional rights. Similar provisions have withstood constitutional challenge before this Court. *See, People v. Kirkpatrick,* 32 N.Y.2d 17 (1973) *appeal dism'd sub. nom., Kirkpatrick v. New York,* 414 U.S. 948 (1973); *Milky Way Production, Inc. v. Leary,* 305 F. Supp. 288 (S.D.N.Y. 1970), *aff'd,* 397 U.S. 98 (1970).

More importantly, under Texas law the challenged presumptions are at best merely permissible inferences. The State is required to prove each fact giving rise to the presumption beyond a reasonable doubt; even if facts are proved beyond a reasonable doubt, a jury is not bound to find that the element sought to be presumed exists; all other elements of the offense must be proved beyond a reasonable doubt; and if any fact giving rise to the presumption is not proved beyond a reasonable doubt, the presumption fails. § 2.05, Vernon's Texas Annotated Penal Code. (Appendix A).

II.

PLENARY REVIEW OF THE COURT OF APPEALS DECISION TO GIVE BINDING EFFECT TO THIS COURT'S PRIOR DISMISSAL FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION IN SEWELL V. GEORGIA WOULD NOT BE APPROPRIATE SINCE PETITIONERS ARE COMMERCIAL PURVEYORS OF ADULT SEXUALLY ORIENTED MATERIAL AND THUS ARE IN THE SAME POSTURE AS THE CONVICTED DEFENDANT IN SEWELL.

As Respondents noted before the court of appeals, the United States Supreme Court on three occasions has dis-

missed appeals for want of a substantial federal question where the convicted state defendant raised a constitutional challenge to a provision proscribing "obscene devices" under a Georgia statute similar to that of Texas. *Sewell v. State,* 233 S.E.2d 137 (Ga. 1977), *appeal dism'd sub. nom. Sewell v. Georgia,* 435 U.S. 982 (1978); *Teal v. State,* 238 S.E.2d 128 (Ga. 1977) *appeal dism'd sub. nom. Teal v. Georgia,* 435 U.S. 989 (1978); *Simpson v. State,* 242 S.E.2d 265 (Ga. 1978), *appeal dism'd sub. nom. Simpson v. Georgia,* 439 U.S. 887 (1978). Further, Respondents submitted that these dismissals were decisions *on the merits* by this Court of the constitutional challenges by Petitioners. *Hicks v. Miranda,* 422 U.S. 332 (1975).

Respondents are well aware of this Court's admonitions expressed in *Mandel v. Bradley,* 432 U.S. 172 (1977) wherein it was stated that binding effect should be given only to the precise issues presented and decided. In the instant case, however, Petitioners, as commercial purveyors of adult sexually oriented material, stand in exactly the same posture as the convicted defendants in the three Georgia cases. They clearly have no standing to assert the rights of privacy of others. *Paris Adult Theater I. v. Slaton,* 413 U.S. 49 (1973).

"Obscene device", as defined by the statute, means a device including a dildo or artificial vagina, designed or marketed primarily for the stimulation of the human genital organs. The devices proscribed by the Texas statute are clearly of the same nature as those found failing to raise a substantial federal question in the Georgia cases. As Petitioners acknowledge, the device in question in *Sewell,* for example, was an "artificial

vagina". Considering the similarity in the Texas and Georgia statutes and the devices sought to be regulated, it was sound judicial economy for the court of appeals to have been guided by this Court's decisions in the Georgia cases, particularly in light of the "identity of interests" of Petitioners and the convicted Georgia defendants.

CONCLUSION

For the aforesaid reasons, the court of appeals' decision was correct, and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

TEXAS PENAL CODE

§ 2.05. Presumption

When this code or another penal law establishes a presumption with respect to any fact, it has the following consequences:

(1) if there is sufficient evidence of the facts that give rise to the presumption, the issue of the existence of the presumed fact must be submitted to the jury, unless the court is satisfied that the evidence as a whole clearly precludes a finding beyond a reasonable doubt of the presumed fact; and

(2) if the existence of the presumed fact is submitted to the jury, the court shall charge the jury, in terms of the presumption and the specific element to which it applies, as follows:

(A) that the facts giving rise to the presumption must be proven beyond a reasonable doubt;

(B) that if such facts are proven beyond a reasonable doubt the jury may find that the element of the offense sought to be presumed exists, but it is not bound to so find;

(C) that even though the jury may find the existence of such element, the state must prove beyond a reasonable doubt each of the other elements of the offense charged; and

(D) if the jury has a reasonable doubt as to the existence of a fact or facts giving rise to the presumption, the presumption fails and the jury shall not consider the presumption for any purpose.